Supreme Court, U.S.
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No. 94-

In The

Supreme Court of the United States

October Term, 1994

SOUNDGARDEN, a musical group comprised of Matthew Cameron, Christopher Cornell, Hunter Benedict Shepard, and Kim Thayil; et al.,

Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF WASHINGTON; et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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118 pp

QUESTION PRESENTED FOR REVIEW

Whether plaintiffs who bring an action under a state declaratory judgment act and 42 U.S.C. § 1983, challenging the constitutionality of a state statute prior to its enforcement, and who obtain declaratory and injunctive relief on the grounds that the statute infringed their freedom of expression in violation of the rights of free speech and due process as secured by the First and Fourteenth Amendments to the United States Constitution, are entitled to an award of their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

PARTIES TO THE PROCEEDING

The Petitioners in this proceeding are SOUNDGARDEN, a musical group comprised of MATTHEW CAMERON, CHRISTOPHER CORNELL, HUNTER BENEDICT SHEPARD, and KIM THAYIL; HOWARD LEESE, ANN WILSON and NANCY WILSON, individuals and members of the musical group HEART; ANTHONY RAY, aka SIR MIX-A-LOT; CRIMINAL NATION, a musical group comprised of MARK WOMACK and EUGENE DeHOSTOS; ALICE IN CHAINS, a musical group comprised of JERRY FULTON CANTRELL, JR., SEAN KINNEY, LAYNE STALEY, and MICHAEL STARR; CHRIS NOVOSELIC, an individual and member of the musical group NIRVANA; PEARL JAM, a musical group comprised of DAVE ABBRUZZESE, JEFF AMENT, STONE GOSSARD, MIKE McCREADY, and EDDIE VEDDER; QUEENSRYCHE, a musical group comprised of CHRIS DeGARMO, EDDIE JACKSON, SCOTT ROCKENFIELD, GEOFF TATE, and MICHAEL WILTON; SEVEN YEAR BITCH, a musical group comprised of VALERIE AGNEW, ELIZABETH DAVIS, and SELENE VIGIL; DIANE SCHURR; A & M RECORDS, INC.; ATLANTIC RECORDING CORPORATION; BMG MUSIC; CAPITOL-EMI MUSIC, INC.; C/Z RECORDS; ELEKTRA ENTERTAINMENT; EMI RECORDS GROUP, N.A.; ESTRUS RECORDS; DAVID GEFFEN COMPANY, dba DEGGEN RECORDS and DGC RECORDS; GLOBAL PACIFIC RECORDS, INC.; GRP RECORDS, INC.; ISLAND RECORDS, INC.; JOEY RECORDS, INC.; MCA RECORDS, INC.; POLYGRAM RECORDS, INC.; PRIORITY RECORDS, INC.; PROFILE RECORDS, INC.; SONY MUSIC ENTERTAINMENT, INC.; SUB POP LIMITED, INC.; WARNER BROTHERS RECORDS, INC.; WBR/SIRE VENTURES, INC., dba SIRE RECORDS

COMPANY; RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.; WASHINGTON MUSIC INDUSTRY COALITION, INC.; ORPHEUM RECORDS; PTERODACTYL TAPE AND DISC; RUBATO RECORDS; SOUND AFFECTS; TOWER RECORDS, also known as MTS, INC.; ALFRED BURGO, III, dba D.T. PRODUCTIONS; IAN CODDINGTON, a minor; AMY DAVIES, a minor, and LAURA and DOUGLAS DAVIES, her parents; TIMOTHY KAUFMAN-OSBORN; CLAIR MATSON, a minor; LAURIE ANDERSON; and HAMMERBOX, a musical group comprised of CARRIE AKRE, HARRIS THURMOND, DAVID BIRENBAUM, and JAMES ATKINS.

All of the Petitioners were plaintiffs in the proceedings below. Two plaintiffs are not Petitioners in this Proceeding: Stephanie Sargent and Nastymix, Inc.

The Respondents in this proceeding are the ATTORNEY GENERAL OF THE STATE OF WASHINGTON, the STATE OF WASHINGTON, and the KING COUNTY PROSECUTING ATTORNEY. The Attorney General and King County Prosecuting Attorney are named in their official capacities. All of the Respondents were defendants in the proceedings below. The only defendant who is not a Respondent in this Proceeding is the Snohomish County Prosecuting Attorney.

RULE 29.1 LISTING OF PARENT COMPANIES AND SUBSIDIARIES

Petitioners having parent companies are as follows:[1]

A&M Records, Inc.'s parent company is Polygram Holding, Inc.

Atlantic Recording Corporation's parent companies are Warner Bros. Records, Inc., Warner Communications, Inc., and Time Warner, Inc.

BMG Music's parent companies are Bertelsmann Music Group, Inc., Bertelsmann, Inc., and Bertelsmann A.G.

Capitol-EMI Music, Inc.'s parent company is Thorn EMI North America Holding Co., Inc.

Electra Entertainment is a Division of Warner Communications, Inc., whose parent company is Time Warner, Inc.

EMI Records Group, N.A.'s parent company is Thorn EMI North America Holding Co., Inc.

David Geffen Company, d/b/a Geffen Records and DGC Records' parent company is MCA, Inc.

GRP Records, Inc.'s parent company is MCA, Inc.

Island Records, Inc.'s parent company is PolyGram Holding, Inc.

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[1] None of the Petitioners has a non-wholly owned subsidiary.

MCA Records, Inc.'s parent companies are MCA, Inc. and Matsushita Electric Industrial Co., Ltd.

Polygram Records, Inc.'s parent company is Polygram Holding, Inc.

Sony Music Entertainment, Inc.'s parent companies are Sony Music Holding, Inc., Sony Music Software Corporation, Sony Corporation of America, and Sony Corporation Tokyo.

Warner Bros. Records, Inc.'s parent companies are Warner Communications, Inc. and Time Warner, Inc.

WBR/Sire Ventures Inc., d/b/a/ Sire Records' parent companies are Warner Bros. Records, Inc., Warner Communications, Inc., and Time Warner, Inc.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (Appendix A) is reported at 123 Wn.2d 750, 871 P.2d 1050 (1994). The opinions of the Superior Court for King County (Appendices D and E) are unreported.

JURISDICTION

The Washington Supreme Court filed its opinion affirming the judgment of the King County Superior Court on April 14, 1994 (Appendix A), and entered its order denying Petitioners' timely motion for reconsideration on May 24, 1994 (Appendix B), on which date the court's opinion became the decision terminating review.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable

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[2] Under Rule 12.4 of Washington's Rules of Appellate Procedure ("RAP"), a dissatisfied party may file a "Motion for Reconsideration" of a decision terminating review. The text of RAP 12.4 is set forth in Appendix F. As this is the only route for seeking rehearing under the RAP, this motion is equivalent to a petition for rehearing under Supreme Court Rule 13.4, which provides that the time for filing the petition for a writ of certiorari runs from the denial of a petition for rehearing.

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(b) provides:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

In the spring of 1992, the State of Washington enacted House Bill 2554, referred to herein as the "Erotic Music Statute" and codified at RCW 9.68.050-.120, which amended a Washington statute regulating the sale, distribution, and exhibition of materials deemed obscene as to minors. The Erotic Music Statute added "sound recordings" to the list of regulated materials, which previously was limited to writings, films, prints, and pictures. The law became effective on June 11, 1992.

On June 23, 1992, prior to any enforcement of the Erotic Music Statute, Petitioners filed a Complaint for Declaratory Judgment and Injunctive Relief in King County Superior Court, naming as defendants the State of Washington; Attorney General Kenneth O. Eikenberry, in his official capacity; and the Prosecuting Attorneys of King County and Snohomish County, Norm Maleng and Seth Dawson,

respectively, in their official capacities.[3] Appendix C. Petitioners, including over 70 musicians and musical groups, record companies, music industry associations, record stores, minors, parents, and other individuals, alleged that the Erotic Music Statute violated their rights of free speech, due process, and trial by jury secured under the Washington Constitution and their rights of free speech and due process secured under the First and Fourteenth Amendments of the United States Constitution. Petitioners specifically alleged a claim for relief under the federal civil rights laws, 42 U.S.C. §§ 1983 & 1988. Appendix ("App.") C-24.

In their prayer for relief, Petitioners asked for a declaratory judgment that the Erotic Music Statute was unconstitutional, preliminary and permanent injunctions against its enforcement, and an award of their reasonable attorney's fees pursuant to 42 U.S.C. §§ 1983 & 1988. App. C-24 - C-25.

On September 17, 1992, Petitioners filed a motion for preliminary injunction, supported by over twenty affidavits and declarations from the Petitioners themselves, in which they explained how the Erotic Music Statute infringed their freedom of expression and interfered with the creative process of musical expression, the business of producing and selling sound recordings, and the access of both minors and adults to the music of their choice. App. A-5. For example, under fear of prosecution under the law, record stores

> instituted policies to prevent sale to minors of even recordings which have not been adjudged erotic, but which might possibly be considered erotic, including

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[3] Seth Dawson was dismissed from the case on jurisdictional grounds on July 15, 1992, and is not a party to this proceeding.

> requiring proof of age or simply canceling orders for the recordings from distributors or manufacturers. Those shopkeepers claim they are already experiencing loss of revenue. Artists claim they are concerned that, in order to insure that their music will not violate the statute, they must curtail their protected speech and expression or risk loss of sales because of censorship by shopkeepers or the State.

App. A-18. The Respondents neither challenged nor rebutted the statements in Petitioners' affidavits and declarations. App. A-5 - A-6 & A-18. By unopposed motion of Petitioners and order of the King County Superior Court on September 28, 1992, the hearing on the motion for preliminary injunction was consolidated with trial on the merits.

At the trial on October 29, 1992, the Superior Court ruled for the Petitioners, declaring that the Erotic Music Statute was unconstitutional and enjoining the Respondents from enforcing it. The ruling was reduced to a written order and entered on November 20, 1992. App. D. The Superior Court specifically found, based on Petitioners' unchallenged affidavits and declarations:

> [T]he Erotic Music Statute causes [Petitioners] to censor their speech out of fear of criminal prosecution. This self-censorship, which is caused by state action, has a chilling effect on [Petitioners'] freedom of expression and creativity, and also deprives willing listeners of the right to hear protected speech in violation of the First Amendment to the United States Constitution and Article 1, Section 5 of the Washington Constitution.

App. D-8. The Superior Court further held that the Erotic Music Statute violated the right of due process secured by Article 1, Section 3 of the Washington Constitution and the Fourteenth Amendment of the United States Constitution and the right of trial by jury secured by Article 1, Sections 21 and 22 of the Washington Constitution.

Aside from Petitioners' claim for attorney's fees, which the parties agreed to address separately, the court awarded all of the relief sought by Petitioners in its November 20 order. On December 17, 1992, Respondent Attorney General filed a timely notice of appeal to the Washington Supreme Court.

On December 18, 1992, Petitioners filed their Petition for Award of Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 1988, which addressed Petitioners' entitlement to fees and, by agreement of the parties, reserved the appropriate amount of fees for future determination. In opposition, Respondents argued that Petitioners had pursued their suit under Washington's Declaratory Judgment Act, RCW 7.24.010 *et seq.*, and not under 42 U.S.C. § 1983. On February 11, 1993, the Superior Court accepted this argument and denied Petitioners' claim for fees. App. E. On March 1, 1993, Petitioners filed a timely notice of appeal of this ruling to the Washington Supreme Court. The two appeals were consolidated on March 29, 1993, and the Washington Supreme Court granted direct review of the consolidated appeals on September 1, 1993.

On April 14, 1994, the Washington Supreme Court affirmed the King County Superior Court's rulings on the merits and on the issue of attorneys' fees. App. A. The court's opinion emphasized the undisputed facts, set forth in Petitioners' affidavits and declarations, that the Erotic Music

Statute had violated Petitioners' freedom of speech. App. A-18.

On the question of attorneys' fees under 42 U.S.C. § 1983 ("Section 1983") and 42 U.S.C. § 1988 ("Section 1988"), the court held as follows:

> [Section] 1983 requires infringement of a person's civil rights before a cause of action accrues. It is undisputed that in this case neither Kenneth O. Eikenberry nor Norm Maleng, individually or in their official capacity, has prosecuted or attempted to prosecute anyone under the 'Erotic Music Statute,' RCW 9.68.050, .060, .070 and .090.

App. A-35. In concluding its opinion, the court reiterated: "[Petitioners] are not entitled to attorney fees under 42 U.S.C. § 1988 for violation by a public official of their civil rights under color of law under § 1983 because the public officials named in this case have not attempted to enforce the 'Erotic Music Statute'." App. A-37. In support of its holding, the court cited several Washington cases, noting that "[i]n every case a governmental entity or official had sought to enforce a statute, ordinance or policy prior to being sued under 42 U.S.C. § 1983 for violation of civil rights under color of law." App. A-35 n. 76.

Petitioners sought rehearing of the court's decision on attorney's fees by filing a timely Motion for Reconsideration on May 4, 1994. The Washington Supreme Court denied the motion on May 24, 1994. App. B.

REASONS FOR GRANTING THE PETITION

The decision of the Washington Supreme Court carries far-reaching ramifications for the enforcement of federal civil rights. In essence, the court has held that an unconstitutional law does not subject persons to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983, until that law is enforced against them, even if they can and do demonstrate that the law is causing them present injury. The practical impact of this holding is to deny injured persons the federal remedies of Section 1983, which provides their cause of action, and Section 1988, which makes it financially feasible for them to bring suit, particularly in cases where no money damages are sought. The Petition thus presents an important question of federal law.

Of perhaps greater significance, at least with respect to this Court's decision on whether to grant the Petition, is the conflict between the Washington Supreme Court's decision and this Court's judgment in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), as well as numerous decisions of the federal circuit courts. Thus, Petitioners invoke this Court's review because the Washington Supreme Court "has decided a federal question in a way that conflicts with [an] applicable decision[ ] of this Court," Supreme Court Rule 10.1(c), as well as decisions of the federal courts of appeals, Supreme Court Rule 10.1(b). At minimum, the important federal question raised by these conflicts should be "settled by this Court." Supreme Court Rule 10.1(c). The Petition should be granted.

A. The Decision of the Washington Supreme Court Conflicts with the Judgment of this Court in *Texas State Teachers Association v. Garland Independent School District.*

In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), this Court unanimously held that plaintiffs who brought a successful Section 1983 challenge to a school district administrative regulation were entitled to an award of their attorneys' fees under Section 1988, even though the unconstitutional portions of the regulation had never been enforced against them. While the Court's opinion did not specifically analyze the question presented by Petitioners here, the Court's judgment directly conflicts with the decision of the Washington Supreme Court denying Petitioners their fees.

The regulation at issue in the *Garland* litigation consisted of several policies concerning school employees' communications with and about employee organizations. These policies (1) prohibited communications between outside employment organizations and school employees during school hours; (2) prohibited outside employment organizations from using school mail facilities; (3) prohibited employee organizations from using school premises for meetings during non-school hours, except by permission of the school principal; and (4) prohibited teachers' discussions among themselves concerning employment organizations during school hours. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1050-55 (5th Cir. 1985), *aff'd mem.*, 479 U.S. 801 (1986). When school officials enforced the first of these policies against members of the Texas State Teachers Association (the "TSTA") who attempted to distribute literature and meet with teachers at Garland schools, the TSTA and the Garland Educational

Association brought a Section 1983 action challenging the school district regulation. Significantly, the third and fourth policies were never enforced against the plaintiffs. 777 F.2d at 1050 n.5, 1054.

The district court held that only the third policy was unconstitutional, and this holding was not appealed by the defendants. *Id.* at 1050. The Fifth Circuit held that the fourth policy was also unconstitutional, even though there had been no enforcement. *Id.* at 1054-55. The Fifth Circuit panel stated:

> [T]he mere fact that this policy exists is sufficient to support appellants' cause of action. Even if no officials attempt to overhear teacher conversations, conscientious teachers should be expected to obey school regulations. The regulation inhibits the speech of law abiding teachers. Thus, even without actual monitoring of conversations, the rule chills teacher speech in violation of their First Amendment rights.

Id. at 1055. This Court summarily affirmed the Fifth Circuit. *Garland Independent Sch. Dist. v. Texas State Teachers Ass'n*, 479 U.S. 801 (1986) ["*Garland I*"].

On remand, plaintiffs sought their attorney's fees under Section 1988. The district court refused to award fees, and the Fifth Circuit affirmed, holding that plaintiffs were not "prevailing parties" because they had failed to achieve the primary relief they sought, which was securing school access by outside employee organizations. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 837 F.2d 190 (5th Cir. 1988), *rev'd*, 489 U.S. 782 (1989) ["*Garland II*"].

This Court, in *Garland II*, rejected the Fifth Circuit's narrow test of "prevailing party" and awarded fees to the plaintiffs. The Court explained:

> Petitioners here obtained a judgment vindicating the First Amendment rights of public employees in the workplace. Their success has materially altered the school district's policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities. Petitioners have thus served the 'private attorney general' role which Congress meant to promote in enacting § 1988. They prevailed on a significant issue in the litigation and have obtained some of the relief they sought and are thus 'prevailing parties' within the meaning of § 1988.

489 U.S. at 793.

Petitioners here, too, successfully served as private attorneys general. They obtained a judgment vindicating the First Amendment rights of musicians, record companies, record stores, and individuals throughout the State of Washington, and materially altered state law that was infringing the exercise of those First Amendment rights. The Washington Supreme Court's denial of attorney's fees to Petitioners cannot be reconciled with this Court's judgment in *Garland II*.[4]

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[4] The correct rule of law also should be clarified in light of this Court's opinion in *Farrar v. Hobby*, -- U.S. --, 113 S. Ct. 566 (1992), holding that a plaintiff who obtained only nominal damages on his Section 1983 claim was a prevailing party under Section 1988 but not entitled to any fees. According to language in the *Farrar* opinion, a plaintiff who obtains a declaratory judgment that a law is unconstitutional in the absence of any enforcement of the law has

B. The Decision of the Washington Supreme Court Conflicts with the Decisions of Several Federal Courts of Appeals.

The Washington Supreme Court's holding that Petitioners are not entitled to an award of their attorneys' fees under Section 1983 and Section 1988 because the Erotic Music Statute had not been enforced against them also conflicts with several decisions of the United States Courts of Appeals. The conflict is most direct with a decision of the Tenth Circuit in several consolidated cases involving congressional districts in the State of Kansas, *In re Kansas Congressional Dists. Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984). Following the 1980 census, the Kansas legislature enacted two redistricting measures, both of which were vetoed by the Governor of Kansas. The day after the second of the vetoes, plaintiffs brought suit for declaratory and injunctive relief under the federal civil rights laws, 42 U.S.C. § 1981 ("Section 1981") and Section 1983, alleging that the existing congressional districts violated Article 1, Section 2 and the Fourteenth Amendment of the United States Constitution. All the parties, including the defendants, took the position that the districts were unconstitutional, and the three-judge district court agreed. 745 F.2d at 612. The district court also awarded plaintiffs their attorneys' fees under Section 1988.

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achieved only a "technical" victory and may not be a prevailing party for purposes of Section 1988. 113 S. Ct. at 574. While Petitioners here obtained far more than a technical victory, the present case illustrates some tension between this Court's opinion in *Farrar* and its judgment in *Garland II*.

The defendants appealed the attorneys' fees ruling, arguing that the case did not involve violations of Section 1981 or Section 1983 because the defendants had taken no action to enforce the unconstitutional districts. Indeed, the defendant Secretary of State had asserted that he would not take such action. *Id.* The Tenth Circuit rejected the argument, noting that the Secretary had responsibility for administering the election laws, that the plaintiffs' constitutional rights were threatened by the absence of a valid redistricting plan, and that the plaintiffs "did not need to rely on [the Secretary's] assertion that he would not enforce the existing districts."[5] *Id.* The Tenth Circuit thereby rejected the very position adopted by the Washington Supreme Court.[6]

At least two other federal circuit courts have similarly awarded fees in pre-enforcement civil rights actions.[7] In *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), a devotee of the Hare Krishna religion brought a Section 1983 challenge to a local

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[5] The court also held that the Secretary's assurances "amount[ed] to no more than an assertion that he acted in good faith, which is not a special circumstance" justifying denial of fees under Section 1988. 745 F.2d at 613.

[6] Indeed, the facts supporting a Section 1983 claim are even stronger in the present case because of the Erotic Music Statute's demonstrated violation of Petitioners' freedom of speech; no such present injury was demonstrated in the Kansas cases.

[7] In addition, the Third Circuit, in a New Jersey redistricting challenge much like the Kansas one, affirmed the district court's ruling that the plaintiffs were entitled to their fees under Section 1988 because the court had adopted their proposed redistricting plan. *Daggett v. Kimmelman*, 811 F.2d 793 (3d Cir. 1987). The defendants against whom fees were awarded challenged only the amount of the fee award.

ordinance restricting the distribution of literature and solicitation of funds in the Dallas-Fort Worth Airport complex, alleging that the ordinance violated the First and Fourteenth Amendments. A previous ordinance had been challenged by members of the religion who were arrested for violating it, but that suit was dismissed when the Airport Board modified the ordinance. The modified ordinance was then challenged prior to its enforcement. The district court invalidated the ordinance, enjoined its enforcement, and awarded plaintiff her fees under Section 1988. The Fifth Circuit affirmed.

The Ninth Circuit has issued at least two decisions in conflict with the Washington Supreme Court's decision. In *Sable Communications v. Pacific Telephone*, 890 F.2d 184 (9th Cir. 1989), a purveyor of telephone messages with sexual content brought a pre-enforcement, Section 1983 challenge to a regulation promulgated by the California Public Utilities Commission that authorized disconnection of the purveyor's telephone service. The district court held the regulation in violation of the First and Fourteenth Amendments and awarded attorney's fees to the plaintiffs pursuant to Section 1988, and the Ninth Circuit affirmed. The court reached the same conclusion in *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986), a set of three consolidated First and Fourteenth Amendment challenges to county ordinances regulating nude dancing. The plaintiffs sued for declaratory and injunctive relief prior to any prosecutions under the ordinances. 804 F.2d at 1106. The district court ruled in favor of the plaintiffs on most of their claims, and awarded one of them fees as a "prevailing party" under Section 1988. The Ninth Circuit affirmed on the

merits, and agreed that the one plaintiff was entitled to a fee award.[8] 804 F.2d at 1112.

The conflicts identified above are not isolated instances. The rule announced by the Washington Supreme Court -- that plaintiffs cannot pursue federal civil rights claims pre-enforcement -- applies not only to regulations of speech, religion, and voting rights, but also to other laws that implicate civil rights and are often challenged under Section 1983 prior to their enforcement, such as laws regulating abortion. In several successful Section 1983 challenges to abortion laws, federal courts of appeals have held that the plaintiffs are entitled to their fees under Section 1988, with no indication that the laws actually had been enforced. *See, e.g., Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991); *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988), *cert. denied sub nom. Diamond v. Charles*, 492 U.S. 905 (1989); *Aware Woman Clinic, Inc. v. City of Cocoa Beach, Fla.*, 629 F.2d 1146 (5th Cir. 1980).

The understanding of Section 1983 and Section 1988 exhibited by the above decisions of the federal courts of appeals is shared by federal district courts that have considered similar claims. For example, in *American Booksellers Ass'n, Inc. v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), the plaintiffs brought a Section 1983 action challenging the constitutionality of an anti-pornography city ordinance. Like the Petitioners here, the *Hudnut* plaintiffs brought an action seeking declaratory and

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[8] The other plaintiff was denied fees on the ground that it had obtained an injunction against only part of the challenged ordinance. 804 F.2d at 1112. This reasoning is almost certainly incorrect in light of this Court's subsequent decision in *Garland II*.

injunctive relief soon after the ordinance became effective and prior to any enforcement. The defendants first contended that the case was non-justiciable because the ordinance had not been enforced against the plaintiffs. The district court disagreed that the plaintiffs were required to expose themselves to an actual prosecution in order to challenge a law deterring the exercise of their constitutional rights, and held the ordinance unconstitutional. 598 F. Supp. at 1329. The district court subsequently granted plaintiffs an award of their attorneys' fees pursuant to Section 1988. *American Booksellers Ass'n v. Hudnut*, 650 F. Supp. 324, 326 (S.D. Ind. 1986).[9]

The Washington Supreme Court's decision to deny Petitioners their fees, when Petitioners succeeded in obtaining declaratory and injunctive relief against a statute that, while yet to be enforced, was causing them demonstrated injury, is a sharp departure from the apparent consensus among the federal courts. The decision directly conflicts with the decision of the Tenth Circuit in the Kansas redistricting cases, and cannot be reconciled with decisions rendered by the Fifth and Ninth Circuits and several federal district courts. Petitioners invoke this Court's review in order to resolve the conflict that the Washington Supreme Court has created.

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[9] *See also Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994) (plaintiffs who brought successful Section 1983 challenge to term limits law were "prevailing party" under Section 1988, though they were denied fees because of "special circumstances rendering an award unjust"); *Holy Spirit Association v. Peterson*, 489 F. Supp. 428 (N.D. Ill. 1979) (court awarded fees under Section 1988 in pre-enforcement Section 1983 challenge to ordinance on ground that "[p]laintiffs were not required to violate the ordinance and suffer arrest in order to test its constitutionality.").

C. The Petition Presents an Important Federal Issue of Broad Impact.

The Petition involves far more than a private squabble over attorney's fees or a conflict among the courts of appeals on a technical issue of statutory construction. In denying Petitioners' claim for fees, the Washington Supreme Court has held that persons who are demonstrably harmed by the enactment of an unconstitutional state statute cannot invoke the federal civil rights laws until the statute is enforced against them. This holding extends beyond the rights of Petitioners to affect the rights of all persons in the State of Washington -- as well as other jurisdictions that may adopt the holding -- whose freedom of speech or other civil rights may be infringed by unconstitutional state action. The Washington Supreme Court's interpretation of Section 1983 to mean that one cannot be "deprived" of one's civil rights absent actual enforcement of an unconstitutional law that is already causing injury has far-reaching implications for the private enforcement of federal constitutional rights.

The Washington Supreme Court's decision evinces a fundamental misunderstanding of the purpose and meaning of the federal civil rights laws. The original purpose of Section 1983, which was enacted as part of the Civil Rights Act of 1871 and modeled after a provision of the Civil Rights Act of 1866, was to enforce the Fourteenth Amendment of the United States Constitution. *Mitchum v. Foster*, 407 U.S. 225, 238 (1972). The impetus behind the enactment of the federal Civil Rights Act was the several states' failure to secure federally protected rights. *Id.* at 238-42. Section 1983's predecessor was thus intended to provide "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* at 239. These incursions include not only

the paradigmatic deprivation of rights by a police officer or other employee of the executive branch of government, but all forms of "unconstitutional action under color of state law, 'whether that action be executive, *legislative*, or judicial.'" *Id.* at 242 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)) (emphasis added). Under the Washington Supreme Court's ruling, Section 1983 provides no remedy for unconstitutional legislative action.

Moreover, Section 1983 is meant not only to remedy deprivations of civil rights but also to deter them. As this Court recently stated, "[t]he purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, -- U.S. --, 112 S. Ct. 1827, 1830 (1992). The hope of deterring legislative bodies from enacting unconstitutional laws is diminished if those laws must be enforced by executive or judicial officials before they are vulnerable to attack.

Section 1988, originally enacted as the Civil Rights Attorney's Fees Awards Act of 1976, is a critical component of this mechanism of deterrence. It removes the primary disincentive to private suits to enforce civil rights: the cost of paying the lawyers. "The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation omitted). The legislative history of Section 1988 elaborates on this purpose:

> [C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

By ensuring private plaintiffs access to the courts to enforce their constitutional rights, Section 1988 works together with Section 1983 to deter unconstitutional state action. Section 1988's role is particularly crucial in actions seeking only prospective relief, like the present one. Where plaintiffs have no prospect or basis for recovering monetary damages, Section 1988 gives them the opportunity at least to break even on their litigation, and thereby increases the likelihood that suit will be brought. The greater the likelihood that suits will be brought and that the state will have to pay plaintiffs' fees, the greater the deterrent effect. A state defendant who faces no risk of damages liability for taking unconstitutional action is unlikely to be deterred from doing so absent the risk of having to pay a prevailing plaintiff's attorney's fees pursuant to Section 1988. In the present case, the state had demonstrably achieved the censorship it sought without actual enforcement. Absent action by Petitioners, the infringements of their First and Fourteenth Amendment rights would have continued unabated. As this Court has recognized, federal civil rights actions seeking only prospective relief are common, and prevailing plaintiffs should be awarded their fees under

Section 1988. *Pulliam v. Allen*, 466 U.S. 522, 527 n.4 (1984).

Because the Washington Supreme Court held that Petitioners had not been deprived of their constitutional rights within the meaning of Section 1983, it did not opine on the question whether Petitioners "prevailed" in their suit within the meaning of Section 1988. Nevertheless, there is little doubt that Petitioners meet this Court's definition of "prevailing party." A party prevails "for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433. The plaintiff "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Garland II*, 489 U.S. at 792; *see also Farrar v. Hobby*, -- U.S. --, 113 S. Ct. 566, 573 (1992) ("In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.").

Petitioners succeeded on all issues in this litigation and achieved all of the benefits they sought in bringing suit, with the one exception of their claim for attorney's fees under Section 1988.[10] Petitioners claimed that the Erotic Music

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[10] The King County Superior Court denied Petitioners their fees on the grounds that the suit was brought under the Washington Declaratory Judgment Act and that the court "made no finding that the Defendants' [sic] were liable pursuant to 42 U.S.C. § 1983." App. E-2. The Washington Supreme Court, however, did not adopt this reasoning, perhaps realizing that it runs afoul of well-settled precedent. *See, e.g., Smith v. Robinson*, 468 U.S. 992, 1002 (1984) (noting "general rule that when the claim upon which a plaintiff actually prevails is accompanied by a 'substantial,' though undecided, § 1983 claim arising from the same nucleus of facts, a fee award is appropriate"). Petitioners' Section 1983

Statute violated their rights of free speech, due process, and trial by jury, and the court agreed. Petitioners sought a declaratory judgment and injunctive relief, and the court awarded both. The declaration that the law was unconstitutional and the permanent injunction against its enforcement changed the legal position of the Petitioners relative to the Respondents by eliminating the source of the infringement on Petitioners' freedom of speech and by preventing any action by the Respondents against them. Petitioners are "prevailing parties" under Section 1988, just as were the petitioners in *Garland II*.[11]

People should not have to await enforcement of an unconstitutional law against them before they can act under the federal civil rights laws to preserve their rights and remedy deprivations of their rights, especially if the law is already causing them injury. Section 1983 and Section 1988 do not impose such a waiting period. The Washington Supreme Court's decision, however, does, and thereby conflicts with the decisions of numerous other federal courts, including this Court's judgment in *Garland II*. Petitioners respectfully request this Court's review of this far-reaching decision.

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claim, which alleged that their rights under the First and Fourteenth Amendments were violated by the Erotic Music Act, arose out of the same facts and was more than substantial -- it set forth the very basis for the declaratory and injunctive relief awarded.

[11] As prevailing parties, Petitioners are entitled to recover their attorneys' fees "unless special circumstances would render such an award unjust." *Hensley*, 461 U.S. at 429 (internal quotation omitted). Neither the King County Superior Court nor the Washington Supreme Court identified any such special circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 19, 1994

[Nos. 59947-5, 60093-7. En Banc. April 14, 1994.]

SOUNDGARDEN, ET AL, *Respondents*, v. KENNETH O. EIKENBERRY, *as Attorney General*, ET AL, *Appellants*, NORM MALENG, as *Prosecuting Attorney*, *Interested Party*.

[1] **Statutes - Validity - Invalidity - Standard of Review.** A trial court's declaration that a statute is unconstitutional is reviewed de novo.

[2] **Statutes - Construction - Unambiguous Language - Ordinary Meaning.** The meaning of a plain and unambiguous statute is derived from its own words.

[3] **Obscenity - Statutory Provisions - Constitutional Construction - Strained Interpretation.** An obscenity statute challenged as being facially invalid cannot be construed to cure its constitutional deficiencies if to do so results in a strained interpretation; such a statute may be construed to cure any facial deficiencies only if a plain reading of the statutory language makes the construction reasonable.

[4] **Obscenity - Statutory Provisions - "Erotic Material" - Validity.** The definition of "erotic material" in RCW 9.68.050(2) is valid.

[5] **Obscenity - Constitutional Provisions - State and Federal Constitutions.** There is no state constitutional analysis in obscenity cases independent of federal constitutional analysis; if a publication is obscene under the federal constitution, it is also obscene under the state constitution.

[6] **Obscenity - Constitutional Provisions - Scope - Adult Materials.** As a general rule, any material which is not obscene for adults is protected under both the federal and state constitutions.

[7] **Criminal Law - Statutes - Overbreadth - Policy.** The overbreadth doctrine is predicated on the danger that persons may refrain from exercising a constitutionally protected means of expression for fear of criminal sanctions under a statute which could be interpreted as applicable to such protected expression.

[8] **Criminal Law - Statutes - Overbreadth - Test.** A statute is unconstitutionally overbroad if it prohibits a real and substantial amount of protected conduct in addition to its plainly legitimate sweep and the court is unable to place a sufficiently limiting construction upon it.

[9] **Constitutional Law - Freedom of Speech - Prior Restraint - What Constitutes.** A prior restraint is an administrative or judicial order forbidding future speech. A prior restraint is presumed to be unconstitutional.

[10] **Constitutional Law - Freedom of Speech - Prior Restraint - Test.** Unless shown to be a bar against speech which is not constitutionally protected, a prior restraint is unconstitutional even if the speech can be validly restrained after it occurs.

[11] **Constitutional Law - Due Process - Scope - Factors.** Minimal due process requires notice and an opportunity to be heard. The degree of due process to be afforded requires a court to balance (1) the private interest to be protected, (2) the risk of erroneous deprivation of that

interest by the government's procedures, and (3) the government's interest in maintaining its procedures.

[12] **Obscenity - Erotic Music Statute - Validity - Due Process.** The two-stage procedure of RCW 9.68.060 for determining if a sound recording is erotic as applied to minors, under which notice of the initial hearing is not given to all interested parties nor is adequate notice given as to which sound recordings have been determined to be erotic, violates due process.

[13] **Obscenity - Erotic Music Statute - Validity - Prior Civil Determination of Obscenity.** In a prosecution under RCW 9.68.060 for distributing erotic materials to minors, the ability of the State to prove an element of the crime by relying upon a prior judicial determination that the materials are obscene violates RCW 9A.04.100 and due process.

[14] **Obscenity - Erotic Music Statute - Obscene Materials - Question of Law or Fact.** In a prosecution under RCW 9.68.060 for distributing erotic materials to minors, whether material is obscene is a question of fact which must be resolved by a jury.

[15] **Declaratory Judgment - Costs - Scope - Attorney Fees.** For purposes of awarding costs to a plaintiff who succeeds in obtaining a declaratory judgment under RCW 7.24, costs do not include attorney fees.

ANDERSEN, C.J., and BRACHTENBACH, J., concur by separate opinion; DURHAM, J., concurs in the result only.

Nature of Action: Various persons and businesses involved in the sound recording industry sought a judgment declaring the "erotic music statute" to be unconstitutional, an

injunction permanently enjoining its enforcement, and attorney fees and costs.

Superior Court: The Superior Court for King County, No. 92-2-14258-9, Mary Wicks Brucker, J., on November 20, 1992, entered a judgment declaring the statute to be unconstitutional and enjoining its enforcement and on February 11, 1993, entered an order denying attorney fees and costs.

Supreme Court: Holding that the definition of "erotic materials" as applied to minors meets constitutional standards, but that the remainder of the act violates due process, and that the plaintiffs are not entitled to recover attorney fees, the court affirms the judgment and the order.

Christine O. Gregoire, Attorney General, William B. Collins, Senior Assistant, and *Carol A. Murphy* and *John J. Samson, Assistants,* for appellants.

Preston Gates & Ellis, by *Paul J. Lawrence* and *Floyd G. Short* and *Davis Wright Tremaine,* by *Daniel Waggoner* and *Debora K. Kristensen (David E. Leibowitz,* of counsel), for respondents.

Norm Maleng, Prosecuting Attorney, and *Dennis C. McMahon, Senior Deputy.*

SMITH, J. --The State[1] appeals direct to this court from an order of the King County Superior Court declaring unconstitutional the "Erotic Sound Recordings" statute

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[1] Appellants are collectively referred to as "the State." Former Attorney General Kenneth O. Eikenberry is also an Appellant. King County Prosecuting Attorney Norm Maleng, who was a defendant in the trial court, is listed as "an interested party" on appeal.

(House Bill 2554, Laws of 1992, ch. 5, codified as RCW 9.68.050, .060, .070 and .090, and also known as the "Erotic Music Statute") and permanently enjoining its enforcement. Respondents/Cross Appellants, Soundgarden, et al.,[2] defend the judgment of the trial court, but appeal from its order denying attorney fees and costs.[3] We affirm the Superior Court.

STATEMENT OF FACTS

On March 20, 1992, Governor Booth Gardner signed the "Erotic Sound Recordings" statute[4] which became effective June 11, 1992. According to plaintiffs (Respondents/Cross Appellants here) and their supporters who filed affidavits and declarations, the statute interferes with their ability to express themselves, manage their businesses, and access ideas; and interferes with society's notion of a free marketplace of ideas and, in general, the evolution of society itself.[5] The claims

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[2] Soundgarden is a musical group consisting of Matthew Cameron, Christopher Cornell, Hunter Benedict Shepard and Kim Thayil. They are joined by other recording artists, record stores, record companies and several individuals, including minors. Together, plaintiffs (Respondents/Cross Appellants) number over 70 individuals and entities.

[3] The appeal from the denial of attorney fees was initially brought under a separate cause number, 60093-7. On March 29, 1993, the two appeals were consolidated under number 59947-5.

[4] House Bill 2554, Laws of 1992, ch. 5, which amended Laws of 1969, 1st Ex. Sess. §§ 13, 14, 15, 17 to include the words "sound recording(s)" or "erotic sound recording" is now codified as RCW 9.68.050, .060, .070, and .090. The former version applied only to erotic visual materials such as writings, films, prints and pictures, and has never been challenged.

[5] *See* Supplemental Clerk's Papers, at 31-133.

made in these affidavits and declarations were not directly challenged by the State.

On June 23, 1992, plaintiffs (Respondents/Cross Appellants) filed in the King County Superior Court a complaint for declaratory judgment, claiming that the "Erotic Sound Recordings" statute (also known as the "Erotic Music Statute") is unconstitutional as a violation of, and prior restraint upon, free speech and due process under the federal and state constitutions. They also sought a permanent injunction against its enforcement and sought attorney fees and costs under 42 U.S.C. § 1988 and § 1983. Defendants (the State) responded that the law is constitutional. All parties agreed that this is a facial challenge to the statute.

The "Erotic Sound Recordings" statute has not been enforced to date. King County Prosecuting Attorney Norm Maleng, a defendant at trial (Interested Party here), has not appealed the orders of the trial court. He claims there is no evidence he has attempted to enforce, or in the future would attempt to enforce, the statute and that therefore he should not be a designated party in this action and should not be required to pay attorney fees and costs if they are awarded.[6] While Snohomish County Prosecuting Attorney Seth Dawson was named as a defendant on the Summons and Complaint, he was dismissed from the case early in the proceedings.[7]

The King County Superior Court, the Honorable Mary W. Brucker, determined that the statute was void on its face for vagueness; and that it constituted a prior restraint

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[6] Clerks' Papers, at 224-226; Brief of Interested Party Norm Maleng.

[7] Brief of Interested Party Norm Maleng n.1.

upon speech in violation of the federal and state constitutions because it did not provide adequate notice to persons who might be prosecuted under its provisions and because it allowed a judge to decide what is fundamentally a jury question. She also determined that the bifurcated nature of the statute's application violates the due process requirement that every element of a crime must be proved beyond a reasonable doubt.[8] On October 29, 1992, Judge Brucker also granted an order permanently enjoining enforcement of the statute.[9] A written order was filed on November 20, 1992.[10]

At the hearing on November 20, 1992, it was agreed that a petition for attorney fees and costs would be filed separately. On December 17, 1992, Kenneth O. Eikenberry, as Attorney General, filed a notice of appeal to this court of the order of the trial court granting the permanent injunction and declaratory judgment. Norm Maleng, as King County Prosecuting Attorney, did not appeal that order.

On December 18, 1992, plaintiffs filed in the trial court a petition for award of attorney fees and costs under 42 U.S.C. § 1988. The State (both Kenneth O. Eikenberry and Norm Maleng) claimed the proceeding was a declaratory action under RCW 7.24 and not a civil rights complaint under 42 U.S.C. § 1983. It argued that since no attempt was ever made to enforce the "Erotic Music Statute," there is no violation of the plaintiffs' rights by an individual "under color

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[8] *See also* RCW 9A.04.100.

[9] Verbatim Report of Proceedings of the oral ruling (Oct. 29, 1992).

[10] Verbatim Report of Proceedings of hearing (Nov. 20, 1992) and order granting permanent injunction against enforcement of Erotic Music Statute, Clerk's Papers, at 194-203.

of state law." Kenneth O. Eikenberry also asserts the definition of "individual" under § 1983 may include a county or municipal official, but under Washington law does not include the state or any state official.[11]

A hearing was held on January 22, 1993. On February 11, 1993, Judge Brucker denied attorney fees and costs, stating that the action was only for declaratory judgment under RCW 7.24 and not a civil rights complaint under 42 U.S.C. § 1983.[12] On March 1, 1993, plaintiffs (Respondents/Cross Appellants) filed a notice of appeal to this court of the order of the trial court denying attorney fees and costs.

On March 15, 1993, plaintiffs (Respondents/Cross Appellants) filed a motion to consolidate their appeal with that of the State. The appeals were consolidated on March 29, 1993. This court granted direct review of the consolidated appeals on September 1, 1993.

QUESTIONS PRESENTED

The questions presented in this case are whether the "Erotic Sound Recordings" statute (also known as the "Erotic Music Statute," House Bill 2554, Laws of 1992, ch. 5; RCW 9.68.050, .060, .070, and .090), is unconstitutional and whether Respondents/Cross Appellants (plaintiffs in the trial court) are entitled to an award of attorney fees and costs under 42 U.S.C. § 1988.

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[11] Clerk's Papers, at 213-20, 224-26, and 227-38; Supplemental Clerk's Papers, at 1-8, 11-22, 23-28.

[12] Supplemental Clerk's Papers, at 29-30.

DISCUSSION

[1-3] There are no findings of fact in this case. A statute has been declared unconstitutional by the trial court. Under these circumstances this court reviews the case de novo.[13] "Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself."[14] In obscenity cases, "[a]lthough *Miller* [*v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973)] required state law to specify the type of sexual acts which may be obscene, state courts are allowed to construe state statutes so as to cure any facial deficiencies."[15] However, a court may not strain to interpret the statute as constitutional: a plain reading must make the interpretation reasonable.[16]

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[13] *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984).

[14] *Service Employees Int'l Union, Local 6 v. Superintendent of Pub. Instruction*, 104 Wn.2d 344, 348, 705 P.2d 776 (1985) (quoting *Human Rights Comm'n v. Cheney Sch. Dist.* 30, 97 Wn.2d 118, 121, 641 P.2d 163 (1982)). *See also State v. Standifer*, 110 Wn.2d 90, 92, 750 P.2d 258 (1988).

[15] *State v. Reece*, 110 Wn.2d 766, 772, 757 P.2d 947 (1988) (citing *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) and *Ward v. Illinois*, 431 U.S. 767, 771, 52 L. Ed. 2d 738, 97 S. Ct. 2085 (1977)).

[16] *State v. Walter*, 66 Wn. App. 862, 870, 833 P.2d 440 (1992), *review denied*, 121 Wn.2d 1033 (1933).

Obscenity Test for Minors: RCW 9.68.050

In 1992 the Legislature amended RCW 9.68.050, .060, .070 and .090 to include sound recordings in the list of materials which could be considered erotic if they otherwise meet the test for obscenity adjusted to apply to minors. These provisions were originally enacted in 1969[17] and were based upon several United States Supreme Court opinions which announced the test for obscenity. The obscenity test is codified as a definition of "erotic material" under RCW 9.68.050(2), which reads:

> (2) "Erotic material" means printed material, photographs, pictures, motion pictures, sound recordings, and other material the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value[.]

The test for obscenity has been upheld by the United States Supreme Court as not violative of the First Amendment to the United States Constitution. In *Ginsberg v. New York,*[18] the court observed that "girlie" magazines sold to a 16-year-old boy were not obscene for adults under *Redrup v. New York*[19] and that the appellant merchant was not prohibited from stocking and selling them to adults. However, the court stated that obscenity is not within the

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17 Laws of 1969, 1st Ex. Sess., ch. 256, §§ 13, 14, 15, 17.

18 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968).

19 *Ginsberg,* at 634 (citing *Redrup v. New York,* 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967)).

area of protected speech or press, and approved the concept of "variable obscenity" which adjusts the definition of obscenity announced in its prior opinions to apply to minors.[20] The court also stated that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .'"[21] The court determined that New York's three-pronged definition of obscenity adjusted for minors was not void for vagueness and affirmed conviction of the merchant.[22] The New York statutory test of obscenity provided in relevant part:

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

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[20] *Ginsberg*, at 635 (citing *Roth v. United States*, 354 U.S. 476, 485, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, 1309 (1957); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413, 418, 16 L. Ed. 2d 1, 86 S. Ct. 975, 977 (1966)).

[21] *Ginsberg*, at 638 (citing *Prince v. Massachusetts*, 321 U.S. 158, 170, 88 L. Ed. 645, 64 S. Ct. 438, 444 (1944)).

[22] *Ginsberg*, at 633.

(iii) is utterly without redeeming social importance for minors.[23]

[4] The Washington statutory definition of "erotic material" is substantially similar to the New York statutory definition of "obscenity". The Washington definition of "erotic material" under RCW 9.68.050 at least meets the *Ginsberg* test of a constitutionally valid definition of obscenity adjusted for minors.

[5] In *Ginsberg* the United States Supreme Court slightly modified its prior definition of obscenity.[24] However, it has permitted states to adhere to the "utterly without redeeming social value" standard under their own state constitutions.[25] But this court recently declared in *State v. Reece*[26] that "if a publication meets the federal test as an obscenity, it may be banned under both the state and federal constitutions." Under *Reece*, then, there is no independent state constitutional analysis in obscenity cases in Washington.

[6] Respondents/Cross Appellants claim, however, that music enjoys absolute constitutional protection and can never be subjected to the obscenity test. They are correct in noting that no state court has applied the obscenity test to a musical

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23 N.Y. Penal Law 1909 § 484-h(1)(f)(i), (ii), (iii) as enacted by 1965 N.Y. Laws 327. The New York statute, however, also provided that the person prosecuted must have "knowledge" of the character of the material sold and the age of the minor.

24 *See Miller v. California*, 413 U.S. 15, 24-25, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973).

25 *See Ward v. Illinois*, 431 U.S. 767, 773, 52 L. Ed. 2d 738, 97 S. Ct. 2085, 2089 (1977).

26 110 Wn.2d 766, 776, 757 P.2d 947 (1988), *cert. denied*, 493 U.S. 812 (1989).

sound recording, and that no work of music alone has yet been held to be obscene even for minors. However, federal courts have considered whether a particular sound recording was obscene. Those courts did apply the obscenity test, but found the state had failed to prove the work was obscene in the cases before them.[27] The general rule still is that any material which is not obscene for adults is constitutionally protected.[28]

Procedures Under RCW 9.68.060

RCW 9.68.060 provides:

(1) When it appears that material which may be deemed erotic is being sold, distributed, or exhibited in this state, the prosecuting attorney of the county in which the sale, distribution, or exhibition is taking place may apply to the superior court for a hearing to determine the character of the material with respect to whether it is erotic material.

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[27] *See Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir.), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 585, 113 S. Ct. 659 (1992), which concerned the "rap" artists "2 Live Crew" and their album "As Nasty As They Wanna Be". The court concluded the sheriff failed to prove the work was obscene. *See also Skywalker Records, Inc. v. Navarro*, 739 F.Supp. 578 (S.D. Fla. 1990), *rev'd sub nom. Luke Records, Inc. v. Navarro, supra*, which found the sound recording was obscene under the Florida statute but that the sheriff's actions in obtaining and enforcing against a shopkeeper an ex parte order declaring the work obscene constituted a prior restraint. *See also Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084, *reh'g denied*, 964 F.2d 1148 (11th Cir.) *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 245, 113 S. Ct. 325 (1992), where the trial court stated the lyrics of the music were subject to obscenity analysis, but concluded the work challenged was not obscene.

[28] *See* U.S. Const. amend. 1; Const. art. 1, § 5.

(2) Notice of the hearing shall immediately be served upon the dealer, distributor, or exhibitor selling or otherwise distributing or exhibiting the alleged erotic material. *The superior court shall hold a hearing not later than five days from the service of notice* to determine whether the subject matter is erotic material within the meaning of RCW 9.68-.050.

(3) If the superior court rules that the subject material is erotic material, then, following such adjudication:

(a) If the subject material is written or printed, or is a sound recording, the court shall issue an order requiring that an "adults only" label be placed on the publication or sound recording, if such publication or sound recording is going to continue to be distributed. Whenever the superior court orders a publication or sound recording to have an "adults only" label placed thereon, such label shall be impressed on the front cover of all copies of such erotic publication or sound recording sold or otherwise distributed in the state of Washington. Such labels shall be in forty-eight point bold face type located in a conspicuous place on the front cover of the publication or sound recording. *All dealers and distributors are hereby prohibited from displaying erotic publications or sound recordings in their store windows, on outside newsstands on public thoroughfares, or in any other manner so as to make an erotic publication or the contents of an erotic sound recording readily accessible to minors.*

(b) If the subject material is a motion picture, the court shall issue an order requiring that such motion picture shall be labeled "adults only". The exhibitor shall prominently display a sign saying "adults only" at the place of exhibition, and any

advertising of said motion picture shall contain a statement that it is for adults only. Such exhibitor shall also display a sign at the place where admission tickets are sold stating that it is unlawful for minors to misrepresent their age.

(c) Failure to comply with a court order issued under the provisions of this section shall subject the dealer, distributor, or exhibitor to contempt proceedings.

(d) Any person who, after the court determines material to be erotic, sells, distributes, or exhibits the erotic material to a minor shall be guilty of violating RCW 9.68.050 through 9.68.120, such violation to carry the following penalties:

(i) For the first offense a misdemeanor and upon conviction shall be fined not more than five hundred dollars, or imprisoned in the county jail not more than six months;

(ii) For the second offense a gross misdemeanor and upon conviction shall be fined not more than one thousand dollars, or imprisoned not more than one year;

(iii) For all subsequent offenses a felony and upon conviction shall be fined not more than five thousand dollars, or imprisoned not less than one year.

(Italics ours.)

Overbreadth

Respondents/Cross Appellants argue that not all obscenity is denied constitutional protection.[29] They contend that regulation of obscenity which impacts protected expression must be strictly analyzed by this court to determine whether it is overly broad and chills or infringes protected expression. They claim that the Court in *Ginsberg* "did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them", and that the State cannot, by enacting a law for the protection of minors, "prohibit an adult's access to material that is obscene for minors but not for adults."[30] Respondents/Cross Appellants claim the erotic music statute is overbroad in two ways: it directly regulates speech that is not obscene for adults, and it creates a "massive" chilling effect on speech that is not obscene at all.

[7] The Court in *Ginsberg* permitted direct regulation of speech that is not obscene for adults by allowing an adjusted obscenity standard for minors. The overbreadth doctrine is predicated on the supposed danger that "persons whose expression is constitutionally protected may well refrain from

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[29] *Citing R.A.V. v. St. Paul, Minnesota*, ___ U.S. ___, 120 L. Ed. 2d 305, 112 S. Ct. 2538, 2543 (1992).

[30] Brief of Respondents/Cross-Appellants at 20 (quoting *American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990), *reh'g denied*, 930 F.2d 925, *cert. denied*, ___ U.S. ___, 114 L. Ed. 2d 479, 111 S. Ct. 2237 (1991)). *See also Butler v. Michigan*, 352 U.S. 380, 383, 1 L. Ed. 2d 412, 77 S. Ct. 524 (1957) (legislation must not "reduce the adult population . . . to reading only what is fit for children").

exercising their Rights for fear of criminal sanctions by a statute susceptible of application to protected expression."[31]

Respondents/Cross Appellants argue that because all regulations of material obscene to minors encompass otherwise protected speech to some degree, in order to avoid overbreadth those regulations must be the least restrictive means of furthering the government's interests in protecting minors.[32]

Respondents/Cross Appellants contend that RCW 9.68.060(3)(a), which prohibits all dealers from displaying erotic music in their store windows, directly affects access by adults, as well as minors, and is not the least restrictive means of furthering the government's interest. They argue that in the context of a sound recording, which must be heard by a minor in order for the erotic material to be conveyed, such a visual restriction is wholly unrelated to the government's interest.

The language of RCW 9.68.060(3)(a) requires only that the erotic "content" of the sound recording not be displayed or made readily accessible to minors. The visual restriction applies only to sound recordings with erotic covers and not to those whose covers are not erotic, while the audio restriction applies to all erotic music.

Respondents/Cross Appellants also claim that because the statute subjects shopkeepers to civil contempt

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[31] *New York v. Ferber*, 458 U.S. 747, 768, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982) (quoting *Schaumburg v. Citizens for a better Env't*, 444 U.S. 620, 634, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980)).

[32] Citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989).

proceedings and criminal prosecution, and because approximately 25 percent of all "rap" and "rock" music is sold to persons 10 to 19 years of age, it creates a widespread chilling effect or self-censorship upon the whole industry. They also claim the statute is overbroad because it interferes with the right of individuals in the industry to earn a living.[33]

Unchallenged affidavits and declarations in the record indicate that shopkeepers have already instituted policies to prevent sale to minors of even recordings which have not been adjudged to be erotic, but which might possibly be considered erotic, including requiring proof of age or simply canceling orders for the recordings from distributors or manufacturers. Those shopkeepers claim they are already experiencing loss of revenue. Artists claim they are concerned that, in order to insure that their music will not violate the statute, they must curtail their protected speech and expression or risk loss of sales because of censorship by shopkeepers or the State.[34]

The State responds that any self-censorship or other voluntary action by any party limiting its own protected speech is not the result of a prohibition in RCW 9.68.050.090. It claims the statute does not restrict adults from buying sound recordings, nor does it restrict artists from creating the recordings.

[8] It is true that RCW 9.68.060 is not directed at artists. However, the otherwise lawful conduct of shopkeepers (some of whom have described their operations as "progressive") in displaying the content of materials which

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[33] Brief of Respondents/Cross-Appellants, at 22-24.

[34] See Supplemental clerk's Papers, at 31-133.

are not obscene to adults is directly regulated by the statute. Once it is determined that "a statute reaches constitutionally protected speech or expressive conduct," the next question is:

> whether the statute prohibits a "real and substantial" amount of protected conduct in contrast to the statute's plainly legitimate sweep. Even if a statute is "substantially overbroad", it will not be overturned unless the court is unable to place a sufficiently limiting construction upon the statute. If possible, a statute must be interpreted in a manner that upholds its constitutionality.[35]

(Citations omitted.)

Chilling of free speech is the product of state action, which exists if "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State."[36] This court has concluded that the Washington Constitution is less tolerant of overly broad restrictions on speech than the Federal First Amendment and that "regulations that sweep too broadly chill protected speech prior to publication, and thus may rise to the level of a prior restraint", while the United States Supreme Court "considers the overbreadth doctrine 'strong medicine', employing it only as a 'last resort.'"[37]

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35 *State v. Halstien*, 122 Wn.2d 109, 122-23, 857 P.2d 270 (1993).

36 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).

37 *O'Day v. King Cy.*, 109 Wn. 2d 796, 804, 749 P.2d 142 (1988) (citing *State v. Coe*, 101 Wn.2d 364, 373-75, 679 P.2d 353

Respondents/Cross Appellants have not addressed the six nonexclusive analytical factors under *State v. Gunwall.*[38] We need not give consideration to those factors here.

Prior Restraints on Speech

Respondents/Cross Appellants also claim the lack of timely and adequate notice for the initial hearing to determine whether a particular sound recording is erotic also constitutes a prior restraint on speech because insufficient notice will produce self-censorship and a chilling effect upon the music industry and because the language of the statute permits enforcement before any publication to minors.

[9, 10] A prior restraint is an administrative or judicial order forbidding communications prior to their occurrence. Simply stated, a prior restraint prohibits future speech, as opposed to punishing past speech.[39] "[A] prior restraint may be struck down even though the particular expression involved could validly be restricted through subsequent criminal punishment."[40] "Although prior restraints are presumptively unconstitutional, . . . not all prior restraints are prohibited."[41] This court has "expressly rejected an absolute

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(1984); *New York v. Ferber,* 458 U.S. 747, 769, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)).

[38] 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R. 4th 517 (1986).

[39] *Alexander v. United States,* ___ U.S. ___, 125 L. Ed. 2d 441, 113 S. Ct. 2766, 2768 (1993).

[40] Gerald Gunther, *Constitutional Law* 1203 (12th ed. 1991).

[41] *State v. Coe,* 101 Wn.2d 364, 372-73, 679 P.2d 353 (1984), noting that "Federal law has long recognized the validity of some prior restraints on constitutionally unprotected speech, such as obscenity and

bar against prior restraints on speech which is *not* constitutionally protected."[42] But, speech which is not obscene for adults is clearly constitutionally protected speech.

Respondents/Cross Appellants claim the language of RCW 9.68.060(1) permits a prosecuting attorney to request and obtain an initial hearing to determine whether a particular recording is erotic and to apply legal restrictions before the sound recording is played or sold to minors. That subsection provides:

> (1) When it appears that material which may be deemed erotic is being sold, distributed, or exhibited in this state, the prosecuting attorney of the county in which the sale, distribution, or exhibition is taking place may apply to the superior court for a hearing to determine the character of the material with respect to whether it is erotic material.

Respondents/Cross Appellants correctly point out that under the plain language of the statute the sale or distribution need only be to retailers or distributors and need not be to minors for the prosecuting attorney to take action, in effect censoring a recording prior to its publication. Even if that language does constitute a prior restraint, it would be valid at least as applied to minors because the statute regulates material which is obscene (erotic) to minors,[43] and prior

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incitement to acts of violence, and on speech that directly threatens military security."

42 *State v. Coe, supra* at 375.

43 *See Ginsberg v. New York*, 390 U.S. at 635.

restraints of obscenity are constitutionally permitted when minors are affected.[44]

Respondents/Cross Appellants also claim that lack of notice of the initial hearing to interested parties constitutes an impermissible prior restraint because all dealers and distributors are subject to contempt proceedings for violating an injunction against display and sale to minors and for not affixing an "adults only" label, even if they were not a party in the initial hearing and even if they had no knowledge of the injunction. They correctly argue that RCW 9.68.060(3)(a) prohibits all dealers and distributors from selling nonobscene and otherwise constitutionally protected recordings even to adults unless they put an "adults only" label on a recording which they are not aware has been adjudged to be "erotic."[45]

The State argues that the labeling requirement does not attach until after the initial hearing, and that, therefore, it does not constitute a prior restraint. However, this is not a good argument. The present language of RCW 9.68.060(1) constitutes a possibly valid prior restraint as it applies to minors. As Respondents/Cross Appellants correctly argue, though, the statute enjoins sale of nonobscene (nonerotic) materials to adults unless there is a warning label which only the parties in the initial hearing know must be placed on the recording. The State argues that rather than declaring the

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[44] *See State v. Coe, supra* at 375.

[45] *See State v. Coe, supra* at 372-78, where we concluded that a court order enjoining a radio station from broadcasting legally obtained tape recordings after their contents were admitted into evidence in a solicitation of murder trial was an unconstitutional prior restraint. *See also Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 713, 75 L. Ed. 2d 1357, 51 S. Ct. 625 (1931); *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976).

statute a prior restraint, this court could limit it so that contempt proceedings would apply only to dealers and distributors who were parties in the initial hearing. We do not accept that invitation to engage in judicial legislation.

Respondents/Cross Appellants claim the statute, by requiring the "adults only" label, denies recording artists and merchants their right not to speak and thus constitutes a prior restraint. In *Wooley v. Maynard,*[46] the United States Supreme Court stated that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." In that case the court concluded that a New Hampshire law requiring all automobile license plates to carry the state motto "Live Free or Die" was an unconstitutional prior restraint because it compelled speech. The court stated that the message carried an idea which to some might be "morally objectionable". The court emphasized that the motto was required to be placed on an automobile, "which is readily associated with its operator", and distinguished that situation from printing the motto "In God We Trust" on United States currency, which the court noted "is passed from hand to hand" and "need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto."[47] The court discussed "whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates." It concluded that the

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[46] 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977); *see also Pacific Gas & Elec. Co. v. Public Utils. Comm'n,* 475 U.S. 1, 9-18, 89 L. Ed. 2d 1, 106 S. Ct. 903 (1986); *Rhinehart v. Seattle Times Co.,* 98 Wn.2d 226, 271, 654 P.2d 673 (1982), *aff'd,* 467 U.S. 20 (1984).

[47] *Wooley,* at 717 n. 15.

State's claimed interests, even if legitimate and substantial, "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[48] The Court concluded that New Hampshire could not require automobile owners to display the state motto on their license plates.

Respondents/Cross Appellants argue that Washington's erotic music statute is even worse than the unconstitutional automobile license motto statute in *Wooley* because it "imposes its message on particular speakers, rather than on all citizens of the state, thereby making it more probable that the speaker will be understood to endorse that message and stigmatizing a work and its artist and distributors as too 'dirty' for minors."[49] They also argue that the Washington statute compels a "state-mandated message" by threat of civil contempt and criminal penalties and constitutes a "system of prior restraint."

The State argues that no court has ever concluded that a labeling requirement for a product is unconstitutional. It argues that the labeling requirement here is no different from one for a dangerous product and that the Legislature is entitled to protect citizens from harmful materials. It also argues the label "adults only" simply designates to whom a sound recording may be sold and does not counter the message in that recording.

Actually both arguments are plausible under *Wooley*. However, the State of New Hampshire had no compelling

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48 *Wooley*, at 716.

49 Brief of Respondents/Cross-Appellants, at 29; Supplemental Clerk's Papers, at 41.

reason for requiring the state motto to be placed on automobile license plates. In this case, the State of Washington still has a strong and legitimate interest in protecting minors.[50] But that protection can only be provided by constitutional means.

Due Process

[11] Due process at a minimum requires notice and an opportunity to be heard.[51] "Generally, in looking at the degree of process that will be afforded in a particular case, the court balances the following interests: (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government's procedures; and (3) the government's interest in maintaining the procedures."[52]

[12] Respondents/Cross Appellants claim the two-stage procedure of RCW 9.68.060 on its face denies due process because not all interested parties are given timely notice of the initial hearing to determine whether a sound recording is erotic nor adequate notice concerning which recordings have been adjudged to be erotic. They also claim the statute denies the right to a jury trial and violates RCW 9A 04.100, which requires that each element of a crime be proved beyond a reasonable doubt.

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[50] *See Ginsberg v. New York*, 390 U.S. at 638.

[51] *See Watson v. Washington Preferred Life Ins. Co.*, 81 Wn.2d 403, 408, 502 P.2d 1016 (1972); *see also Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974).

[52] *Morris v. Blaker*, 118 Wn.2d 133, 144-45, 821 P.2d 482 (1992) (citing *Matthews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)).

Respondents/Cross Appellants argue that 5 days' notice to a single seller or distributor of an alleged "erotic" sound recording does not provide sufficient time for adequate legal preparation to defend the nature of the questioned sound recording. They argue the language of the statute does not provide for any notice to the artists, producers and manufacturers whose livelihood will be substantially affected.[53] They also argue that, because the labeling requirement and the contempt proceedings for failing to label a sound recording apply to all dealers and distributors in the entire state of Washington (and not merely to the parties in the initial hearing), the hearing does not provide adequate notice to all interested parties.

The State claims the two-stage proceeding is tantamount to a probable cause hearing and a later prosecution. It claims, however, that since the initial hearing to determine whether a sound recording is erotic is a civil proceeding, there is no right to a jury in that proceeding. It argues that the initial hearing does not affect the interests of the artists, producers or manufacturers because none of them is subject to contempt proceedings for failure to comply with the injunction against sale and display without a label. It claims this argument is supported by the language of the statute, RCW 9.68.060(3)(c), which provides that "[f]ailure to comply with a court order issued under the provisions of this section shall subject the dealer, distributor, or exhibitor to contempt proceedings". The State argues that use of the word "the"

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[53] *See Mahoney v. Sailors' Union*, 45 Wn.2d 453, 461-62, 275 P.2d 440 (1954) (right to earn livelihood is protected property right), *cert. denied*, 349 U.S. 915 (1955); *State ex rel. Swartout v. Civil Serv. Comm'n*, 25 Wn. App. 174, 182, 605 P.2d 796 ("right of the individual to contract and to engage in any of the common occupations of life" is protected liberty right), *review denied*, 93 Wn.2d 1021, *cert. denied*, 449 U.S. 992 (1980).

instead of the word "a" immediately before the singular "dealer, distributor, or exhibitor" makes it clear that artists, producers or manufacturers who are not also "the dealer, distributor, or exhibitor" who was a party in the initial hearing are not subject to contempt proceedings for displaying contents of and not labeling erotic sound recordings. It concludes that therefore artists, producers and manufacturers are not being deprived of a constitutionally protected liberty or property interest in the initial hearing and thus have no right to notice of it.

The State is correct in asserting that RCW 9.68.060(3)(c) does not mention artists, producers or manufacturers. But it argues that if they are not also dealers or distributors, they are not subject to civil contempt or criminal prosecution for selling, distributing, or exhibiting "erotic" materials to minors. We do not accept this reasoning.

Respondents/Cross Appellants also claim that 5 days' notice, whether to a single dealer or distributor under the statute or even to artists, producers or manufacturers, is plainly not sufficient for preparation of an adequate defense at the initial hearing.[54] They point out that a vast effort is required to defend the character of a sound recording in the initial hearing. They claim, for example, that many expert witnesses, legal briefs and depositions were required to defend against an adjudication of obscenity the sound recording "As Nasty As They Wanna Be" by the "rap" group

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[54] *See Olympic Forest Prods, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973) (due process hearing "must be granted at a meaningful time and in a meaningful manner"); *see also Cuddy v. Department of Pub. Assistance*, 74 Wn.2d 17, 19, 442 P.2d 617 (1968) (constitutional elements of due process and "fair hearing" include a "reasonable time for preparation of one's case").

"2 Live Crew", in *Skywalker Records, Inc. v. Navarro*[55] and in *Luke Records v. Navarro.*[56] They argue that any shopkeepers given notice of the initial hearing under RCW 9.68.060 would be hard pressed to defend, and probably would not be interested in seriously defending, a particular recording because it would be only one of many items in their shops.

The State claims Washington courts have concluded in other contexts that 5 days' notice before a hearing is sufficient time for preparation.[57] However, the cases cited by the State are distinguishable from this one because those hearings involved primarily factual determinations by nonjudicial boards; and in neither case was there a possibility of civil contempt or criminal prosecution for violation of determinations by the nonjudicial boards. Under the statute in this case, an adjudication of "erotic" is primarily, if not exclusively, a legal determination requiring familiarity with First Amendment law and may eventually result in civil contempt and criminal sanctions. Only 5 days' notice prior to the initial hearing in most instances would not provide sufficient time for preparation of an adequate defense.

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[55] 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd sub nom. Luke Records v. Navarro,* 960 F.2d 134 (11th Cir.), *cert. denied,* ___ U.S. ___, 121 L. Ed. 2d 585, 113 S. Ct. 659 (1992).

[56] 960 F.2d 134 (11th Cir.), *cert. denied,* ___ U.S. ___, 121 L. Ed. 2d 585, 113 S. Ct. 659 (1992).

[57] Citing *Plumbers & Steamfitters Union Local 598 v. WPPSS,* 44 Wn. App. 906, 724 P.2d 1030 (1986), *review denied,* 107 Wn.2d 1021, *cert. denied,* 482 U.S. 905 (1987) and *Cuddy v. Department of Pub. Assistance*, 74 Wn.2d 17, 442 P.2d 617 (1968).

Respondents/Cross Appellants also point out that the statute provides that "any person" may be subject to criminal prosecution "after the court determines material to be erotic" regardless whether any of those persons were parties in the initial hearing or had notice that a particular sound recording had been adjudged to be "erotic". They cite the trial court finding that the statute is vague on its face because "there is no way for citizens or the persons affected by this law to know what the law is -- i.e., that materials have been determined to be erotic -- or how to comply with it."[58]

Following *Ginsberg v. New York, supra,* the definition of "erotic materials" under RCW 9.68.050 provides sufficient and clear notice of what kind of material, if sold or distributed to minors, may subject the vendor to criminal prosecution. In *Ginsberg,* the United States Supreme Court upheld a New York statute with a similar definition of the kinds of material which were "harmful to minors" against a vagueness attack, stating that the definition "gives '. . . adequate notice of what is prohibited' and does not offend the requirements of due process."[59] However, the New York statute in *Ginsberg* also required "knowledge" of the character of the material and of the age of the minor before a person could be convicted.[60] The Washington statute does not require knowledge of the character of the material on the part of the seller, distributor, or exhibitor before subjecting any of them to criminal prosecution. This is a violation of due process.

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58 Order Granting Permanent Injunction; Clerk's Papers, at 199.

59 *Ginsberg,* 390 U.S. at 643.

60 *See Ginsberg,* 390 U.S. at 646.

The State claims a shopkeeper who has perused the sound recordings before selling them will have a good idea which ones cannot be sold to minors under the statute, even without notice of the initial hearing and without notice concerning which recordings have been adjudged to be "erotic". Respondents/Cross Appellants counter that the State's assumption that retailers can peruse every sound recording they purchase and sell is "directly contradicted by the undisputed factual record".[61]

It is true that under the statute no prosecution can take place until after material has been determined by the court to be "erotic".[62] But only one dealer or distributor is notified of the initial hearing.[63] Yet that initial determination by the court applies prospectively and is binding upon all dealers and distributors in the entire state of Washington.[64] That determination thus becomes state-wide legislation which affects the rights of nonparties in violation of due process.[65]

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61 Citing Clerk's Papers, at 126-29.

62 *See* RCW 9.68.060(3)(d).

63 *See* RCW 9.68.060(2).

64 *See* RCW 9.68.060 (3)(a).

65 *See Mahoney v. Sailors' Union,* 45 Wn.2d 453, 461-62, 275 P.2d 440 (1954) (right to earn livelihood is protected property right), *cert. denied,* 349 U.S. 915 (1955); *State ex rel. Swartout v. Civil Serv. Comm'n,* 25 Wn. App. 174, 182, 605 P.2d 796 ("right of the individual to contract and to engage in any of the common occupations of life" is protected liberty right), *review denied,* 93 Wn.2d 1021, *cert. denied,* 449 U.S. 992 (1980). *See also Watson v. Washington Preferred Life Ins. Co.,* 81 Wn.2d 403, 408, 502 P.2d 1016 (1972); *Mitchell v. W.T. Grant*

[13] Respondents/Cross Appellants claim the statute does not prohibit the State from using the initial judicial determination of "erotic" in a later criminal prosecution, which would be a violation of both RCW 9A.04.100 and of due process under *McKinney v. Alabama*.[66] They correctly argue that in a criminal prosecution every element of the crime must be proved beyond a reasonable doubt.[67] They also correctly point out that under the statute the initial judicial determination of "erotic material" might be used to withdraw the determination of erotic content from a jury in a subsequent trial for sale of erotic material to minors. RCW 9.68.060(3)(d) states in part that "[a]ny person who, *after the court determines material to be erotic*, sells, distributes, or exhibits the erotic material to a minor shall be guilty of violating RCW 9.68.050 through 9.68.120 . . ." with penalties for violation provided. (Italics ours.)

The State counters that this language does not actually require withdrawal from a jury of the issue whether the material sold was erotic. It agrees with Respondents/Cross Appellants that that would be in violation of RCW 9A.04.100 and would represent a significant change in the allocation of burdens of proof. It argues, however, that the Legislature cannot be presumed to have intended such a profound change without specifically addressing it. Rather, it claims the issue whether material is erotic must be submitted to the jury, along with the other issues, for a proper conviction. This is a specious argument.

Co., 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974) (due process at a minimum requires notice and an opportunity to be heard).

[66] 424 U.S. 669, 47 L. Ed. 2d 387, 96 S. Ct. 1189 (1976).

[67] *See* RCW 9A.04.100 ("No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.").

Respondents/Cross Appellants argue that a scheme which purports to allow a prior civil determination of erotic character of material to foreclose the issue from a jury at a subsequent criminal trial for sale of that material violates due process under *McKinney* by depriving the defendants of the opportunity to dispute the charge. The United States Supreme Court in *McKinney* vacated a conviction for sale of material which had been declared obscene in a prior civil proceeding because the defendant was not a party to the civil proceeding and had not been "afforded the opportunity to litigate in some forum the issue of . . . obscenity before he . . . [was] convicted of selling obscene material."[68]

The statutory scheme in Washington's "Erotic Music Statute" does not measure up to the due process requirement of *McKinney*.

Jury Trial

Respondents/Cross Appellants claim the statutory scheme on its face violates the right to a trial by jury under the Washington Constitution because the issue of whether something is erotic is a jury issue, but under the statute it is decided conclusively by a single judge at the initial hearing. They argue that because the statutory scheme withdraws from the jury, at the criminal trial, the issue whether the material sold is erotic, the initial hearing is the only forum for litigating that issue. They further argue that even as early as 1886 the anti-obscenity law of the Washington Territory provided that "[t]he jury in all prosecutions, under this act, shall be the sole and exclusive judges, as to whether or not

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68 *McKinney*, at 677.

the matter circulated is obscene or indecent."[69] They contend that article 1, section 21 of the Washington Constitution, which provides that "[t]he right of trial by jury shall remain inviolate," must be interpreted as it would have been on the date of its ratification. They conclude that under the state constitution a jury is required at the initial hearing to determine whether a particular sound recording is erotic.

[14] The State counters that the initial hearing is civil, not criminal, and that there is no right to a jury trial in civil cases under our state constitution. It argues that the whole issue would be re-litigated before a jury in any subsequent criminal prosecution. It further argues that the initial hearing is purely equitable in nature and, as such, does not require a jury trial; and specifically that juries are not required in civil proceedings to determine whether material is obscene. While the State is correct that civil proceedings to determine whether material is obscene do not require juries,[70] under this statutory scheme the initial hearing is not merely a civil proceeding since persons (parties and nonparties) are subject to criminal prosecution for violating the "civil" order of the court. Under the federal and our state constitution defendants in criminal prosecutions are entitled to jury trials. Under *McKinney v. Alabama, supra,* a defendant must be afforded an opportunity to litigate the issue of obscenity or a determination of "erotic,"[71] which would not occur if that

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69 Brief of Respondents/Cross-Appellants, at 41-42 (citing Laws of 1885, p. 123).

70 *See Alexander v. Virginia*, 413 U.S. 836, 37 L. Ed. 2d 993, 93 S. Ct. 2803 (1973); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (1957).

71 *McKinney*, 424 U.S. at 676.

issue is already determined in a civil proceeding prior to a criminal charge.

Attorney Fees

[15] Respondents/Cross Appellants claim they are entitled to attorney fees under 42 U.S.C. § 1988(b) for vindicating their civil rights under 42 U.S.C § 1983. They argue that they clearly brought this declaratory judgment action under both § 1983 (violation of civil rights under color of law) and RCW 7.24 (Uniform Declaratory Judgments Act). They argue that they prevailed in the trial court, as required by § 1988, and that the State has not demonstrated "special circumstances" to make the award of attorney fees unjust.[72] They quote *Herrington v. County of Sonoma*,[73] which stated that "a court's discretion to deny fees under § 1988 is very narrow and . . .' "fee awards should be the rule rather than the exception." ' " They also ask this court for attorney fees and costs on appeal.

The State counters that although the complaint does mention § 1983, the action was in fact brought only under RCW 7.24. It is not disputed that the State of Washington has not consented to being sued in state court under § 1983,[74] but a state official acting in an official capacity is not exempt

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[72] *See Hensley v. Eckerhart*, 461 U.S. 424, 429, 76 L. Ed. 2d 40, 48, 103 S. Ct. 1933, 1937 (1983).

[73] 883 F.2d 739, 743 (9th Cir. 1989) (quoting *Ackerly Communications, Inc. v. Salem*, 752 F.2d 1394, 1396 (7th Cir. 1985)); *see also Duranceau v. Tacoma*, 37 Wn. App. 846, 849-50, 684 P.2d 1311 (1984).

[74] *See Rains v. State*, 100 Wn.2d 660, 666, 674 P.2d 165 (1983); *Edgar v. State*, 92 Wn.2d 217, 222, 595 P.2d 534 (1979), *cert. denied*, 444 U.S. 1077 (1980).

from such an action.[75] However, § 1983 requires infringement of a person's civil rights before a cause of action accrues.[76] It is undisputed that in this case neither Kenneth O. Eikenberry nor Norm Maleng, individually or in their official capacity, has prosecuted or attempted to prosecute anyone under the "Erotic Music Statute," RCW 9.68.050, .060, .070 and .090.[77] However, RCW 7.24.100 provides that "[i]n any proceeding under this chapter,[78] the court may make such award of costs as may seem equitable and just." But the term "costs" does not include "attorney fees".[79] The trial court was correct in denying attorney fees.

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[75] *Monell v. Department of Social Servs.*, 436 U.S. 658, 707, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) (Powell, J., concurring).

[76] *See* 42 U.S.C. § 1983. *See also Collier v. Tacoma*, 121 Wn.2d 737, 854 P.2d 1046 (1993); *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983); *Jacobsen v. Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983); *Duranceau v. Tacoma*, 37 Wn. App. 846, 684 P.2d 1311 (1984); *Ryder v. Port of Seattle*, 50 Wn. App. 144, 748 P.2d 243 (1987). In every case a governmental entity or official had sought to enforce a statute, ordinance or policy prior to being sued under 42 U.S.C. § 1983 for violation of civil rights under color of law.

[77] Laws of 1992, ch. 5

[78] "[T]his chapter" is RCW 7.24, "Uniform Declaratory Judgments Act".

[79] *See Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 541, 585 P.2d 71 (1978) (As used in RCW 7.24.100 "[t]he term 'costs' is synonymous with the term 'expense.' Costs are allowances to a party for the expense incurred in prosecuting or defending a suit, and the word 'costs,' . . . does not include counsel fees."); *Rocky Mt. Fire & Cas. Co. v. Rose*, 62 Wn.2d 896, 889-900, 385 P.2d 45, 1 A.L.R. 3d 876 (1963).

SUMMARY AND CONCLUSIONS

It is clear under *Ginsberg v. New York, supra,* that the constitution permits the Legislature to regulate speech it considers harmful to minors by prohibiting sale to minors of material which is obscene or defined as erotic, based upon contemporary community standards. The definition of "erotic material" under RCW 9.68.050 conforms to the definition of obscenity applied to minors based on contemporary community standards and is, therefore, not void for vagueness.

However, it is also clear under *McKinney v. Alabama, supra,* that a two-stage procedure which imposes consequences from a nonjury civil proceeding upon a defendant at a subsequent criminal proceeding, when that defendant was not a party in the civil proceeding and is deprived of the opportunity to litigate certain issues, violates constitutional due process. RCW 9.68.060 provides for an initial hearing to determine whether a particular thing is "erotic material", (a) brought by a county prosecuting attorney when it appears that material which could be erotic is being distributed in the county (even if not specifically to minors), (b) for which a single dealer or distributor is given 5 days' notice. The court at that hearing may declare the material "erotic", order an "adults only" label placed on all copies of it state-wide, and enjoin the sale, distribution, or exhibition of the "erotic contents" of the material to minors throughout the state of Washington. Violation of the order of the court subjects all dealers and distributors to civil contempt proceedings, and to criminal proceedings for sale, distribution, or exhibition to minors of the "erotic material".

The procedures under RCW 9.68.060 are unconstitutional. The statute constitutes prior restraint upon protected speech as applied to adults. It is overbroad

because it reaches conduct which is constitutionally protected. It violates due process by not providing sufficient time for preparation of an adequate defense at the initial hearing. It violates due process because all dealers and distributors are subject to civil contempt proceedings for violation of an injunction even though they may not have been parties in the initial hearing and even though they may not have notice of the court's determination that a material is erotic. It further violates due process by imposing criminal penalties without providing sufficient notice of which materials have been adjudged to be "erotic", and by not providing that a defendant must have "knowledge" that materials sold are erotic. It also violates due process, RCW 9A.04.100, and the right to a trial by jury in criminal proceedings by allowing the determination whether material sold is "erotic" to be made at the initial civil hearing and presented as a judicial fact to a jury in a subsequent criminal proceeding.

Respondents/Cross Appellants are not entitled to attorney fees under 42 U.S.C. § 1988 for violation by a public official of their civil rights under color of law under § 1983 because the public officials named in this case have not attempted to enforce the "Erotic Music Statute". In an action for declaratory judgment under RCW 7.24.100, "the court may make such award of costs as may seem equitable and just," but "costs" do not include "attorney fees".

We affirm the judgment of the King County Superior Court which declared the "Erotic Sound Recordings" statute, RCW 9.68.050, .060, .070 and .090, unconstitutional. We also affirm the order denying attorney fees and costs.

UTTER, DOLLIVER, GUY, JOHNSON, and MADSEN, JJ., concur.

DURHAM, J., concurs in the result.

ANDERSEN, C.J. (concurring)--I concur in the result of the majority opinion. I write separately to note that the majority opinion, while ostensibly declining to engage in state constitutional analysis, appears in several places to do so. As the majority opinion notes, the parties have not addressed the factors enunciated in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986). Majority opinion, at 764. Under well-established precedent of this court, we will not engage in a state constitutional analysis when the party invoking the Washington State Constitution has failed to brief the *Gunwall* factors. *E.g., Collier v. Tacoma*, 121 Wn.2d 737, 763-66, 854 P.2d 1046 (1993) (Durham, J., concurring); *State v. Wethered*, 110 Wn.2d 466, 472-73, 755 P.2d 797 (1988); *State v. Rodriguez*, 65 Wn. App. 409, 414 n.1, 828 P.2d 636, *review denied*, 119 Wn.2d 1019 (1992). I therefore, do not agree with any state constitutional discussion in the majority opinion. *See, e.g.*, majority opinion at 750-60 n.28, 764, 774-75.

BRACHTENBACH, J., concurs with ANDERSEN, C.J.

THE SUPREME COURT OF WASHINGTON

SOUNDGARDEN, ET AL, Respondents, v. KENNETH O. EIKENBERRY, as Attorney General, ET AL, Appellants, NORM MALENG, as Prosecuting Attorney, Interested Party.	Nos. 59947-5, 60093-7 ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided that the respondents' motion for reconsideration be denied,

It is hereby ordered that the motion is denied.

Dated this 24th day of May, 1994.

\s\ James A. Andersen
Chief Justice

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SOUNDGARDEN, a musical group comprised of MATTHEW CAMERON, CHRISTOPHER CORNELL, HUNTER BENEDICT SHEPARD, and KIM THAYIL; HOWARD LEESE, ANN WILSON and NANCY WILSON, individuals and members of the musical group HEART; ANTHONY RAY, aka SIR MIX-A-LOT; CRIMINAL NATION, a musical group comprised of MARK WOMACK and EUGENE DeHOSTOS; ALICE IN CHAINS, a musical group comprised of JERRY FULTON CANTRELL, JR., SEAN KINNEY, LAYNE STALEY, and MICHAEL STARR; CHRIS NOVOSELIC, an individual and member of the musical group NIRVANA; PEARL JAM, a musical group comprised of DAVE ABBRUZZESE, JEFF AMENT, STONE GOSSARD, MIKE McCREADY, and EDDIE VEDDER; QUEENSRYCHE, a musical group comprised of CHRIS DeGARMO, EDDIE JACKSON, SCOTT ROCKENFIELD, GEOFF TATE, and MICHAEL WILTON; SEVEN YEAR BITCH, a musical	No. 92-2-14258-9 COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

group comprised of VALERIE AGNEW, ELIZABETH DAVIS, STEPHANIE SARGENT, and SELENE VIGIL; DIANE SCHURR; A & M RECORDS, INC.; ATLANTIC RECORDING CORPORATION; BMG MUSIC; CAPITOL-EMI MUSIC, INC.; C/Z RECORDS; ELEKTRA ENTERTAINMENT; EMI RECORDS GROUP, N.A.; ESTRUS RECORDS; DAVID GEFFEN COMPANY, dba DEGGEN RECORDS and DGC RECORDS; GLOBAL PACIFIC RECORDS, INC.; GRP RECORDS, INC.; ISLAND RECORDS, INC.; JOEY RECORDS, INC.; MCA RECORDS, INC.; NASTYMIX, INC.; POLYGRAM RECORDS, INC.; PRIORITY RECORDS, INC.; PROFILE RECORDS, INC.; SONY MUSIC ENTERTAINMENT, INC.; SUB POP LIMITED, INC.; WARNTER BROTHERS RECORDS, INC.; WGR/SIRE VENTURES, dba SIRE RECORDS COMPANY; RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.; WASHINGTON MUSIC INDUSTRY COALITION, INC.; ORPHEUM RECORDS;

PTERODACTYL TAPE AND DISC; RUBATO RECORDS; SOUND AFFECTS; TOWER RECORDS, also known as MTS, INC.; ALFRED BURGO, III, dba D.T. PRODUCTIONS; IAN CODDINGTON, a minor; AMY DAVIES, a minor, and LAURA and DOUGLAS DAVIES, her parents; TIMOTHY KAUFMAN-OSBORN; and CLAIR MATSON, a minor,

Plaintiffs,

v.

KENNETH O. EIKENBERRY, in his official capacity as Attorney General for the State of Washington; THE STATE OF WASHINGTON; NORM MALENG, in his official capacity as Prosecuting Attorney for King County, Washington; and SETH DAWSON, in his official capacity as Prosecuting Attorney for Snohomish County,

Defendants.

For their complaint, Plaintiffs allege as follows:

SUBJECT MATTER

1. Passage of House Bill 2554 by Washington Legislature. House Bill 2554, "AN ACT relating to erotic material and sound recordings," amends RCW 9.68.050, 9.68.060 and 9.68.090. House Bill 2554 was passed, as amended, by the Washington Senate on or about March 3, 1992 and by the Washington House of Representatives on or about March 7, 1992. House Bill 2554 was approved by the Governor of the state of Washington on or about March 20, 1992. A copy of RCW 9.68.050, 9.68.060 and 9.68.090, as amended by House Bill 2554 as approved and filed with the Secretary of State, is attached to this Complaint as Exhibit A and is referenced herein collectively as the "erotic music statute."

2. Effective Date of House Bill 2554. House Bill 2554 as approved became effective on June 11, 1992.

JURISDICTION AND VENUE

3. Jurisdiction. This court has jurisdiction over this declaratory judgment action pursuant to RCW 4.92.010, as a claim against the state of Washington, and pursuant to the Uniform Declaratory Judgment Act, RCW 7.24.010, et seq.

4. Venue. Venue is proper in King County pursuant to RCW 4.92.010(1) as the county of the residence or principal places of business of one or more of the plaintiffs.

PARTIES

5. Plaintiffs. Plaintiffs are songwriters, artists, consumers, retailers, producers and manufacturers of sound recordings, or associations thereof, that are threatened by enforcement actions under the erotic music statute or are restrained from creating, selling, purchasing or playing sound recordings of their choice.

5.1. Artists. Each of these individuals are songwriters and/or artists who create musical performances simultaneously fixed on sound recordings distributed in the state of Washington and are restrained from free exercise of their creativity by threats of enforcement or other actions under the erotic music statute. Each of these artists fear the pejorative "chilling" effect that the required labeling of "Adults Only" and restrictions on sales would have on their work both within the state of Washington and nationally.

5.1.1. Plaintiffs Matthew Cameron, Christopher Cornell, Hunter Benedict Shepard, and Kim Thayil are

individuals who comprised the musical group Soundgarden, reside in the state of Washington, and whose musical works and recorded performance are released under the label A & M Records.

5.1.2. Plaintiffs Howard Leese, Ann Wilson and Nancy Wilson, are individuals who comprise the musical group Heart, reside in the state of Washington, and whose musical works and recorded performances are released under the record label Capitol Records.

5.1.3. Plaintiff Anthony Ray, aka Sir Mix-A-Lot, an individual and a resident of Washington, is a songwriter and recording artist whose musical works and recorded performances are released under the label Def American.

5.1.4. Plaintiffs Mark Womack and Eugene DeHostos are individuals who comprise the musical group Criminal Nation, reside in the state of Washington, and whose musical works and recorded performances are released under the label NASTYMIX, Inc.

5.1.5. Plaintiffs Jerry Fulton Cantrell, Jr., Sean Kinney, Layne Staley, and Michael Starr are individuals who

comprised the musical group Alice in Chains, reside in the state of Washington, and whose musical works and recorded performance are released under the label Columbia Records, a division of Sony Music Entertainment, Inc.

5.1.6. Plaintiff Chris Novoselic, an individual and member of the musical group Nirvana, resides in the state of Washington. Musical works and recorded performances of the group Nirvana are released under the record label DGC Records.

5.1.7. Plaintiffs Dave Abbruzzese, Jeff Ament, Stone Gossard, Mike McCready, and Eddie Vedder are individuals who comprised the musical group Pearl Jam, reside in the state of Washington, and whose musical works and recorded performances are released under the record label Epic Records, a division of Sony Music Entertainment, Inc.

5.1.8. Plaintiffs Chris DeGarmo, Eddie Jackson, Scott Rockenfield, Geoff Tate, and Michael Wilton, are individuals who comprise the musical group Queensryche, reside in the state of Washington, and whose musical works

and recorded performances are released under the label EMI Records.

5.1.9. Plaintiffs Valerie Agnew, Elizabeth Davis, Stephanie Sargent, and Selene Vigil are individuals who comprise the musical group Seven Year Bitch, reside in the state of Washington, and whose musical works and recorded performances are released under the label C/Z Records.

5.1.10. Plaintiff Diane Schurr, a resident of Washington, is a songwriter and recording artist whose musical works and recorded performances are released under the label GRP Records.

5.2. Retailers. The below listed retailers sell and distribute sound recordings that may be claimed to be "erotic" and that are subject to imminent threat of enforcement actions under the erotic music statute.

5.2.1. Plaintiff Pterodactyl Tape and Disc is a local record store operated in Pullman, Washington, engaged in the business of promoting, displaying and selling sound recordings. In fear of enforcement actions under the erotic music statute, Pterodactyl Tape and Disc has removed certain

sound recordings from its main collection and has placed them behind the counter with portions of the covers feared to be "erotic" completely covered from the public's view. These sound recordings include: 2 Live Crew, Sports Weekend; Jane's Addiction, Nothing Shocking; Bad Religion, 80-85; Sub Pop compilation, Fuck Me I'm Rich; Mud Honey, Hate the Police; Dwarfs, Blood Guts and Pussy; Tree People, Something Vicious for Tomorrow; and Skid Row, Wasted Time.

5.2.2. Plaintiff Orpheum Records is a local record store operated in Seattle, Washington, engaged in the business of promoting, displaying and selling sound recordings.

5.2.3. Plaintiff Rubato Records is a local record store operated in Bellevue, Washington, engaged in the business of promoting, displaying and selling sound recordings.

5.2.4. Plaintiff Sound Affects is a local record store operated in Seattle, Washington, engaged in the business of promoting, displaying and selling sound recordings.

5.2.5. Plaintiff Tower Records, also known as MTS, Inc., a California corporation, operates a national chain of record stores that includes record stores in Seattle and Bellevue, Washington, and has its principal place of business in California. Tower Records is engaged in the business of promoting, displaying and selling sound recordings.

5.3. Producers and Manufacturers. All of the below listed producers and manufacturers distribute and sell sound recordings in the state of Washington that may be claimed to be "erotic" and are subject to the threat of enforcement or other actions under the erotic music statute.

5.3.1. Plaintiff A & M Records, Inc., which is incorporated under the laws of Delaware and has its principal place of business if [sic] California, is engaged in creating and producing sound recordings.

5.3.2. Plaintiff Atlantic Recording Corporation, which is incorporated under the laws of Delaware and has its principal place of business in New York, is engaged in the business of creating and producing sound recordings.

5.3.3. Plaintiff BMG Music, which does business as RCA Records and BMG Distribution, is a

partnership organized in New York with its principal place of business in New York. It is engaged in the business of creating and producing sound recordings, and manufacturing and distributing sound recordings.

5.3.4. Plaintiff Capitol-EMI Music, Inc., which is incorporated under the laws of Delaware and has its principal place of business in California, is engaged in the business of creating and producing sound recordings.

5.3.5. Plaintiff C/Z Records is an independent record company, has its principal place of business in Seattle, Washington, and is engaged in the business of creating and producing sound recordings.

5.3.6. Plaintiff Elektra Entertainment is a division of Warner Communications Inc., which is incorporated under the laws of Delaware and has its principal place of business in New York, and is engaged in the business of creating and producing sound recordings.

5.3.7. Plaintiff EMI Records Group, N.A., is a partnership organized in New York with its principal place of business in New York, and is engaged in the business of creating and producing sound recordings.

5.3.8. Estrus Records, a sole proprietorship owned by David Crider with its principal place of business in Bellingham, Washington, is an independent record producer and is engaged in the business of creating and producing sound recordings.

5.3.9. Plaintiff David Geffen Company, which does business as Geffen Records and DGC Records, is incorporated under the laws of California and has its principal place of business in California. It is engaged in the business of creating and producing sound recordings.

5.3.10. Plaintiff Global Pacific Records, Inc., which is incorporated under the laws of California and has its principal place of business in California, is engaged in the business of producing and distributing sound recordings.

5.3.11. Plaintiff GRP Records, Inc., which is incorporated under the laws of New York and has its principal place of business in New York, is engaged in the business of creating and producing sound recordings.

5.3.12. Plaintiff Island Records, Inc., which is incorporated under the laws of New York and has its

principal place of business in New York, is engaged in creating and producing sound recordings.

5.3.13. Plaintiff Joey Records, Inc. which is incorporated under the laws of Texas and has its principal place of business in Texas, is engaged in the business of creating and producing sound recordings.

5.3.14. Plaintiff MCA Records, Inc., is incorporated under the laws of California and has its principal place of business in California. It is engaged in the business of creating and producing sound recordings and manufacturing and distributing sound recordings.

5.3.15. Plaintiff NASTYMIX, Inc., a Washington corporation that has its principal place of business in Seattle, Washington, is an independent record company engaged in the business of creating and producing sound recordings.

5.3.16. Plaintiff Polygram Records, Inc., which is incorporated under the laws of Delaware and has its principal place of business in New York, is engaged in the business of creating and producing sound recordings.

5.3.17. Plaintiff Priority Records, Inc., which is incorporated under laws of California and has its principal place of business in California, is engaged in the business of creating and producing sound recordings.

5.3.18. Plaintiff Profile Records, Inc., which is incorporated under laws of New York and has its principal place of business in New York, is engaged in the business of creating and producing sound recordings.

5.3.19. Plaintiff Sony Music Entertainment, Inc. is incorporated under the laws of Delaware and has its principal place of business in New York. It is engaged in the business of creating and producing sound recordings, and manufacturing and distributing sound recordings.

5.3.20. Plaintiff Sub Pop Limited, Inc. which is incorporated under the laws of Washington and has its principal place of business in Washington, is an independent record company engaged in the business of creating and producing sound recordings.

5.3.21. Plaintiff Warner Brothers Records, Inc., which is incorporated under the laws of Delaware and has its

principal place of business in California, is engaged in the business of creating and producing sound recordings.

5.3.22. Plaintiff WGR/Sire Ventures dba Sire Records Company, which is incorporated under the laws of Delaware and has its principal place of business in New York, is engaged in the business of creating and producing sound recordings.

5.4. Associations and Other Organizations.

5.4.1. Plaintiff Recording Industry Association of America, Inc. ("RIAA") is incorporated under the laws of New York and has its principal place of business in Washington, D.C. RIAA's membership consists of creators and producers of sound recordings, and manufacturers and distributors of prerecorded media including cassette tapes, compact discs and longplaying records (collectively "records"). RIAA's members account for at least 95 percent of the authorized records produced, manufactured and sold in the United States. Among RIAA's basic purposes is to represent its membership before legislative, regulatory, and judicial bodies with respect to federal, state, and local

legislation and regulations affecting the recorded music industry.

5.4.2. Plaintiff Washington Music Industry Coalition is a non-profit corporation, organized under the laws of the state of Washington. The members of the Washington Music Industry Coalition [sic] include local retailers, artists and representatives of the music recordings industry, and its principal place of business is Seattle, Washington. The Washington Music Industry Coalitions' purposes include advocacy of the positions of Washington State's growing music industry regarding, inter alia, censorship before the State's courts and legislature.

5.5. Individuals. Each of the below listed plaintiffs are individual residents of the state of Washington who have been prevented from purchasing or exhibiting sound recordings that may be claimed to be "erotic" or subject to threats of enforcement of the erotic music statute.

5.5.1. Plaintiff Alfred Burgo, III, dba D.T. Productions, is an individual residing in Seattle, Washington, engaged in the business of exhibiting music which he "D.J.'s" at private parties, teen dance clubs and schools that are

attended by minors. Mr. Burgo has been "chilled" from exhibiting certain sound recordings during his performances due to the threat of enforcement or other actions under the erotic music statute.

5.5.2. Plaintiff Ian Coddington, a minor resident of Washington, age 16, was not allowed to purchase any sound recording by the musical group 2 Live Crew in Pullman, Washington, because of the threat of enforcement of the erotic music statute.

5.5.3. Plaintiff Amy Davies, a minor resident of Washington, age 17, whose parents are Laura and Douglas Davies, has been "chilled" from purchasing sound recordings that may be deemed "erotic" because of the threat of enforcement or other actions under the erotic music statute.

5.5.4. Plaintiff Timothy Kaufman-Osborn is an adult resident of Washington who teaches at Whitman College, a college attended by minors. As part of a course he teaches, Mr. Kaufman-Osborn plays the 2-Live Crew sound recording "Nasty as They Wanna Be." Mr. Kaufman-Osborn is restrained from playing that recording in his class because

of the threat of enforcement actions under the erotic music statute.

5.5.5. Plaintiff Claire Matson, a minor resident of Washington, age 17, has been "chilled" from purchasing sound recordings that may be deemed "erotic" because of the threat of enforcement or other actions under the erotic music statute.

6. Defendants. Defendants are the state of Washington, whose legislature enacted the erotic music statute, Kenneth O. Eikenberry in his official capacity as Attorney General for the state of Washington, and both Norm Maleng in his official capacity as Prosecuting Attorney for King County, Washington, and Seth Dawson in his official capacity as Prosecuting Attorney for Snohomish County, Washington pursuant to RCW 36.27.020, all of whom are empowered to enforce the erotic music statute.

FACTUAL ALLEGATIONS EROTIC MUSIC STATUTE

7. Defendants' Enforcement of the Erotic Music Statute. Defendants Kenneth O. Eikenberry in his official capacity as Attorney General for the state of Washington,

Norm Maleng as Prosecuting Attorney for King County, Washington, and Seth Dawson as Prosecuting Attorney for Snohomish County, Washington are charged with the duty of enforcing the erotic music statute. On information and belief, these defendants will enforce the erotic music statute against sound recordings.

8. Erotic Music Statute - Generally. The erotic music statute forbids any person from selling, distributing or exhibiting to minors or otherwise publicly displaying a sound recording found to be "erotic" by any Superior Court of the state of Washington.

9. Erotic Music Statute - Specifically. The erotic music statute imposes a classic system of government censorship, unconstitutional licensing and prior restraint for sound recordings. The elements of that system include the following:

A. Once a prosecuting attorney in any community in the state commences an action under the erotic music statute, a Superior Court must conduct a hearing upon five days notice to a particular dealer, distributor or exhibitor, to determine the "erotic" nature of a particular sound recording.

Aside from the specific defendant, no other parties in interest receive notice of the Superior Court hearing. In this five day time period, a defendant would be required to prepare all elements of its case, including, retaining expert witnesses on the "social value" of the recording. The erotic music statute does not provide for a trial by jury.

B. After one Superior Court finds a sound recording "erotic," all copies of that recording sold in any community in the state of Washington must be labelled on the front cover as "Adults Only" and are banned from the most prominent locations in stores.

C. After one Superior Court finds a sound recording is "erotic", any person in any community violating the court order concerning that sound recording and the resulting requirements of the erotic music statute, whether or not that person has any knowledge of the court order, is (a) subject to contempt proceedings and (b) criminal penalties if the sound recording is sold, distributed or exhibited to a minor. Moreover, that person is not able to defend, de novo and in his or her community, the erotic nature of the relevant sound recording.

FIRST CLAIM FOR RELIEF
VIOLATIONS OF WASHINGTON CONSTITUTION

10. Incorporation of Preceding Allegations. Plaintiffs reallege the allegations in paragraphs 1 through 9.

11. The erotic music statute is directed expressly at forms of art and speech, expressed through sound recordings, protected by Article 1, Section 5 of the Washington Constitution. Such sound recordings include art forms commonly recognized as "country", "heavy metal", "pop", "rock and roll" and "rap" music. Due to the procedures incorporated within the erotic music statute, a defendant is denied the opportunity to demonstrate the protected nature of individual speech in a particular community that could be subject to a statewide ban. Because the erotic music statute will sweep within its prohibition constitutionally protected speech created, produced, distributed, performed, exhibited, and enjoyed by Plaintiffs, enforcement of the erotic music statute will result in infringement of and irreparable harm to the public's and Plaintiffs' constitutional rights under Article 1, Section 5 of the Washington State Constitution.

12. After serving only five days notice to any one dealer, distributor, or exhibitor of an allegedly "erotic" sound recording, any prosecuting attorney in the state may commence a hearing in a Superior Court to determine if the recording is "erotic" within the meaning of the erotic music statute. This five-day notice period allows neither the dealer, distributor, nor exhibitor served, nor the multitude of parties throughout the state whose interests will be affected by the Superior Court hearing and who will not receive notice of the hearing, to prepare a reasonable and meaningful defense. Moreover, the erotic music statute provides that the Superior Court adjudication of a sound recording as "erotic" binds any and all persons in the state to restrain and criminalize the sale, distribution and exhibition of the adjudicated sound recording and precludes anyone from contesting in a subsequent proceeding the superior court's "erotic" determination made for a particular sound recording. The erotic music statute therefore violates Plaintiffs' due process rights under Article 1, Section 3 of the Washington State Constitution.

13. The erotic music statute does not provide for a jury trial in the Superior Court proceedings that determine

whether a particular sound recording is "erotic" within the meaning of the statute. The statute therefore violates the right of trial by jury guaranteed by Article 1, Sections 21 and 22 of the Washington State Constitution.

SECOND CLAIM FOR RELIEF
VIOLATION OF UNITED STATES CONSTITUTION

14. Incorporation of Preceding Allegations. Plaintiffs reallege the allegations in paragraphs 1 through 13.

15. Constitutional Violation. The right to receive, create, exhibit, distribute and sell constitutionally protected speech in the form of sound recordings is abridged by the erotic music statute. The system of censorship and prior restraint established by the erotic music statute, as described in paragraphs 8 and 9 above, violates the First and Fourteenth Amendments to the United States Constitution. Enforcement of this statute will result in infringement of and irreparable harm to the Plaintiffs' and the public's constitutional rights under the First and Fourteenth Amendments to the United States Constitution.

THIRD CLAIM FOR RELIEF
42 U.S.C. § 1983

16. Incorporation of Preceding Allegations. Plaintiffs reallege the allegations in paragraphs 1 through 15.

17. Statutory Violation. 42 U.S.C. § 1983 is violated by the erotic music statute because the statute deprives Plaintiffs' of their First and Fourteenth amendment rights.

18. Attorneys, Fees Award. Plaintiffs should be awarded their attorneys' fees and costs incurred in bringing this action pursuant to 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. That pending the outcome of this action, the Court temporarily enjoin enforcement in any county of the state of Washington of the erotic music statute in its entirety;

B. That the Court enter a declaratory judgment that the erotic music statute is unconstitutional under the First and Fourteenth Amendments to the United States Constitution and under Article 1, Sections 3, 5, 21 and 22 of the Washington Constitution;

C. That the Court permanently enjoin enforcement of the erotic music statute in its entirety;

D. That the court award plaintiffs' [sic] their attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988; and

E. That the court enter other and further relief as it deems just and proper.

DATED this 23rd day of June, 1992.

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David E. Leibowitz
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OFFICES OF GLEN K. THORSTED
Glen K. Thorsted

CHAPTER 5

[House Bill 2554]

EROTIC SOUND RECORDINGS

Effective Date: 6/11/92

AN ACT Relating to erotic material and sound recordings; and amending RCW 9.68.050, 9.68.060, 9.69.090 and 9.68.070.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 9.68.050 and 1969 ex.s. c 256 s 13 are each amended to read as follows:

For the purposes of RCW 9.68.050 through 9.68.120:

(1) "Minor" means any person under the age of eighteen years;

(2) "Erotic material" means printed material, photographs, pictures, motion pictures, sound recordings, and other material the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value;

(3) "Person" means any individual, corporation, or other organization;

(4) "Dealers", "distributors", and "exhibitors" mean persons engaged in the distribution, sale, or exhibition of printed material, photographs, pictures, ((~~or~~)) motion pictures, or sound recordings.

Sec. 2. RCW 9.68.060 and 1969 ex.s. c 256 s 14 are each amended to read as follows:

(1) When it appears that material which may be deemed erotic is being sold, distributed, or exhibited in this state, the prosecuting attorney of the county in which the sale, distribution, or exhibition is taking place may apply to the superior court for a hearing to determine the character of the material with respect to whether it is erotic material.

(2) Notice of the hearing shall immediately be served upon the dealer, distributor, or exhibitor selling or otherwise distributing or exhibiting the alleged erotic material. The superior court shall hold a hearing not later than five days from the service of notice to determine whether the subject matter is erotic material within the meaning of RCW 9.68.050.

(3) If the superior court rules that the subject material is erotic material, then, following such adjudication:

(a) If the subject material is written or printed, or is a sound recording, the court shall issue an order requiring that an "adults only" label be placed on the publication or sound recording, if such publication or sound recording is going to continue to be distributed. Whenever the superior court orders a publication or sound recording to have an "adults only" label placed thereon, such label shall be impressed on the front cover of all copies of such erotic publication or sound recording sold or otherwise distributed in the state of Washington. Such labels shall be in forty-eight point bold face type located in a conspicuous place on the front cover of the publication or sound recording. All dealers and distributors are hereby prohibited from displaying erotic publications or sound recordings in their store windows, on outside newsstands on public thoroughfares, or in any other manner so as to make ((~~them~~)) an erotic publication or the

contents of an erotic sound recording readily accessible to minors.

(b) If the subject material is a motion picture, the court shall issue an order requiring that such motion picture shall be labeled "adults only". The exhibitor shall prominently display a sign saying "adults only" at the place of exhibition, and any advertising of said motion picture shall contain a statement that it is for adults only. Such exhibitor shall also display a sign at the place where admission tickets are sold stating that it is unlawful for minors to misrepresent their age

(c) Failure to comply with a court order issued under the provisions of this section shall subject the dealer, distributor, or exhibitor to contempt proceedings.

(d) Any person who, after the court determines material to be erotic, sells, distributes, or exhibits the erotic material to a minor shall be guilty of violating RCW 9.68.050 through 9.68.120, such violation to carry the following penalties:

(i) For the first offense a misdemeanor and upon conviction shall be fined not more than five hundred dollars, or imprisoned in the county jail not more than six months;

(ii) For the second offense a gross misdemeanor and upon conviction shall be fined not more than one thousand dollars or imprisoned not more than one year;

(iii) For all subsequent offenses a felony and upon conviction shall be fined not more than five thousand dollars, or imprisoned not less than one year.

Sec. 3. RCW 9.68.090 and 1969 ex.s. c 256 s 17 are each amended to read as follows:

No retailer, wholesaler, or exhibitor is to be deprived of service from a wholesaler or wholesaler-

distributor of books, magazines, motion pictures, sound recordings, or other materials or subjected to loss of his franchise or right to deal or exhibit as a result of his attempts to comply with this statute. Any publisher, distributor, or other person, or combination of such persons, which withdraws or attempts to withdraw a franchise or other right to sell at retail, wholesale or exhibit materials on account of the retailer's, wholesaler's or exhibitor's attempts to comply with RCW 9.68.050 through 9.69.120 shall incur civil liability to such retailer, wholesaler or exhibitor for threefold the actual damages resulting from such withdrawal or attempted withdrawal.

Sec. 4. RCW 9.68.070 and 1969 ex.s. c 256 s 15 are each amended to read as follows:

In any prosecution for violation of RCW 9.68.060, it shall be a defense that:

(1) if the violation pertains to a motion picture or sound recording, the minor was accompanied by a parent, parent's spouse, or guardian; or

(2) Such minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or an apparently official document purporting to establish such minor was over the age of eighteen years; or

(3) Such minor was accompanied by a person who represented himself to be a parent, or the spouse of a parent, or a guardian of such minor, and the defendant in good faith relied upon such representation.

Passed the House March 7, 1992.
Passed the Senate March 3, 1992.
Approved by the Governor March 20, 1992.
Filed in Office of Secretary of State March 20, 1992.

D-1

Honorable Mary W. Brucker
Civil Track I

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

SOUNDGARDEN, a musical group comprised of MATTHEW CAMERON, CHRISTOPHER CORNELL, HUNTER BENEDICT SHEPARD, and KIM THAYIL; et al., Plaintiffs, v. KENNETH O. EIKENBERRY, in his Official capacity as Attorney General for the State of Washington; et al., Defendants.	No. 92-2-14258-9 ORDER GRANTING PERMANENT INJUNCTION AGAINST ENFORCEMENT OF EROTIC MUSIC STATUTE

THIS MATTER came for hearing on October 29, 1992, before the Honorable Mary W. Brucker of the Superior Court of King County on Plaintiffs' Complaint for a declaratory judgment that Chapter 5 of the laws of Washington 1992, codified at RCW 9.68.050, 9.68.060 and 9.68.090 (collectively referred to as the "erotic music statute") is

unconstitutional and for a permanent injunction ordering the defendant Kenneth O. Eikenberry in his official capacity as Attorney General for the State of Washington, the State of Washington, and Norm Maleng in his official capacity as Prosecuting Attorney for King County, Washington not to enforce the erotic music statute. The Court has considered the Complaint; the Defendants' Answer to Plaintiffs' Complaint; Plaintiffs' Memorandum of Law and Reply in Support of their Motion for Preliminary Injunction, and its supporting affidavits and declarations filed therewith, including the Affidavit of John Leland, Affidavit of Carlton Long, Declaration of Barbara Dollarhide, Joint Declaration of Jeff Ament, Stone Gossard, Eddie Vedder, Mike McCready, and Dave Abbruzzese, members of the musical group "Pearl Jam", Joint Declaration of Eugene DeHostos and Mark Womack, members of the musical group "Criminal Nation", Declaration of Chris Novoselic, member of the musical group "Nirvana", Joint Declaration of Selene Vigil, Valerie Agnew, and Elizabeth Davis, members of the musical group "Seven Year Bitch", Declaration of Ron Bond, Declaration of Bruce L. Bonifaci, Declaration of John H. Rogers, Declaration of

Robert Streeter, Declaration of Bruce LaVerne, Declaration of Ian Coddington, Declaration of Amy Davies, Declaration of Claire A. Matson, Declaration of Timothy Kaufman-Osborn, Declaration of David K. Crider, Declaration of Daniel House, Declaration of Jonathan Poneman, Affidavit of BMG Music, Affidavit of Capitol Records, Inc., Affidavit of MCA Records, Affidavit of Sony Music Entertainment, Inc., Declaration of Anthony Ray a/k/a "Sir Mix A Lot", and Declaration of Floyd G. Short; Plaintiffs' Motion for Consolidation of Hearing for Preliminary Injunction with Trial on the Merits Pursuant to Civil Rule 65(a)(2); Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and Brief on the Merits; Plaintiffs' Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and Brief on the Merits; and the oral argument of all parties at the hearing on the motion for preliminary injunction and on the merits of Plaintiffs' Complaint. Based on its careful consideration of the evidence and argument submitted, the Court finds and concludes as follows:

(1) Plaintiffs' [sic] filed a motion for consolidation of their hearing for a preliminary injunction with a trial on the merits of their complaint. Defendants did not oppose such a motion. Consolidating plaintiffs' hearing for a preliminary injunction with the trial on the merits of their complaint will advance the litigation and avoid needless expenses of a hearing when all arguments are fully presented in the motion for preliminary injunction. Civil Rule 65.

(2) The State of Washington has a compelling state interest in the protection of the physical and psychological well-being of minors which extends to shielding minors from the influence of materials which are not obscene by adult standards, but which are subject to regulation as to minors.

(3) The citizens of the state of Washington also have a compelling interest in the protection of their rights to freedom of expression and freedom to hear speech under both the First Amendment of the United States Constitution and Article I, Section 8 [sic] of the Washington Constitution.

(4) The provisions of RCW 9.68.050 through 9.68.120, as amended by Chapter 5 of the laws of 1992, constitute a

statutory scheme and must be construed as a whole, not piecemeal.

(5) State statutes and statutory schemes are generally presumed to be constitutional. If one reasonable interpretation renders a statute constitutionally valid and another reasonable interpretation renders it constitutionally invalid, the interpretation which renders the statute valid must prevail. Courts will not strain to interpret a statute as constitutional -- a plain reading of the statute must make such an interpretation reasonable. State v. Coe, 101 Wn.2d 364, 679 P.2d 353 (1984). When a state statute, like this one, threatens free speech rights, however, it will not be afforded the same presumption of constitutionality.

(6) The term "sound recordings" as defined in RCW 9.68.050(2) and used throughout the erotic music statute includes both music and speech. The term "other material" used in RCW 9.68.050(2) also may reach music and speech on "sound recordings."

(7) The term "sound recordings" as used in the erotic music statute reaches expressive speech that does more than

propose a commercial transaction and, therefore, is not commercial speech.

(8) For purposes of this action, the court is only interpreting the language of the erotic music statute. No specific piece of music or other material is before the court.

(9) The erotic music statute establishes a two-stage proceeding. In the first stage, RCW 9.68.060(1) & (2), an individual is brought before a superior court anywhere in the state of Washington on only five days notice and is asked to defend against the state's allegation that the material at issue is "erotic." If the court determines that the material is "erotic" in stage one, a number of statewide requirements automatically go into effect under RCW 9.68.060(3): (1) an "Adults Only" label, in 48 point bold-face type, must be conspicuously placed on the front cover of all copies of the "erotic" material; (2) all dealers and distributors of the "erotic" material are prohibited from displaying that material in their store windows or in any other manner so as to make it "readily accessible" to minors; and (3) any person who sells, distributes, or exhibits the "erotic" material to a minor shall be guilty of a criminal offense.

(10) The statutory scheme culminates with the criminal offense provision, RCW 9.68.060(3)(d), in a stage two proceeding. The criminal conduct defined by that provision is the sale, distribution or exhibition of "erotic" material, regardless of whether or not a defendant had notice of the stage one determination that such material had been found "erotic." If the material has not been previously determined to be "erotic" by a court, there is no crime under the erotic music statute.

(11) A statute is void for vagueness when its terms are so vague that person of common intelligence must necessarily guess at its meaning and differ as to its applicability.

(12) The provisions of the erotic music statute fail to give persons affected notice of what materials have been determined to be "erotic" in a stage one proceeding and therefore fail to provide notice to all those who may be subject to criminal prosecution under RCW 9.68.060(3)(d). As a result, there is no way for citizens or the persons affected by this law to know what the law is -- i.e., that materials have been determined to be erotic -- or how to comply with it. Because the erotic music statute fails to give

clear notice to those affected by it, the erotic music statute violates due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Washington Constitution. McKinney v. Alabama, 424 U.S. 669 (1976).

(13) In failing to provide notice to persons affected of what sound recordings have been found "erotic", the erotic music statute causes plaintiffs to censor their speech out of fear of criminal prosecution. This self-censorship, which is caused by state action, has a chilling effect on plaintiffs' freedom of expression and creativity, and also deprives willing listeners of the right to hear protected speech in violation of the First Amendment to the United States Constitution and Article 1, Section 5 of the Washington Constitution.

(14) RCW 9.68.050(2) defines "erotic" material as speech which "appeals to the prurient interest of minors" (emphasis added). The erotic music statute thus restricts speech fully protected by the United States Constitution and Washington Constitution because it reaches speech which may not be obscene as to adults.

(15) RCW 9.68.060(3)(a) requires all persons affected to carry state mandated message and prevents exhibition or distribution of speech prior to having an opportunity to challenge the validity of such a message or these restraints. By making the stage one "erotic" determination binding upon all citizens, the erotic music statute constitutes a prior restraint on plaintiffs' free speech under State v. Coe, 101 Wn.2d 364, 679 P.2d 353 (1984).

(16) Under the plain reading of the erotic music statute, a person who displays in his or her store window an innocuous album cover of a sound recording, determined to be "erotic" pursuant to RCW 9.68.060(3)(a), may face criminal sanctions. Thus, the erotic music statute is not narrowly drawn to meet the state's compelling interest in the protection of the physical and psychological well-being of minors.

(17) The determination of whether material is "erotic" under RCW 9.68.060 is a jury question. However, no jury is provided for in the proceeding in which the superior court makes the initial determination as to whether the material is erotic. The determination from the initial hearing would be

presented to a jury in the criminal prosecution, as a certified copy of the judgment from the initial proceeding. In a criminal prosecution under the statute, the jury would not reconsider whether or not the material sold is "erotic" nor would the determination that the material is erotic be considered an element of the crime. This procedure violations the plaintiffs' right to a jury trial.

Now, therefore, it is hereby

DECLARED and ORDERED as follows:

1. Plaintiffs' motion to consolidate their hearing for a preliminary injunction with a trial on the merits of their complaint is granted.

2. The erotic music statute is UNCONSTITUTIONAL as violative of (a) the rights of the public and the plaintiffs to free speech under the first and fourteenth amendments to the United States Constitution, as well as under Washington Constitution article I, section 5; (b) due process under the fourteenth amendment to the United States Constitution, as well as under Washington Constitution article I, sections 3 and 10,; [sic] and (c) the rights of the public and plaintiffs to a

jury trial under Washington Constitution article I, sections 21 and 22.

3. Kenneth O. Eikenberry in his official capacity as Attorney General for the State of Washington, his officers, agents, servants, employees, and attorneys are permanently enjoined from enforcing any provision of the erotic music statute against music or sound recordings or any other materials as they may apply to sound recordings.

4. The State of Washington, its officers, agents, servants, employees, and attorneys are permanently enjoined from enforcing any provision of the erotic music statute against music or sound recordings or any other materials as they may apply to sound recordings.

5. Norm Maleng in his official capacity as Prosecuting Attorney for King County, Washington, his officers, agents, servants, employees, and attorneys are permanently enjoined from enforcing any of the provisions of the erotic music statute against music or any sound recordings or any other materials as they may apply to sound recordings.

DONE IN OPEN COURT this 20th day of November, 1992.

\s\ Mary W. Brucker
Judge Mary W. Brucker

Presented by:

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Honorable Mary W. Brucker
Civil Track I

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

SOUNDGARDEN, a musical group, comprised of MATTHEW CAMERON, CHRISTOPHER CORNELL, HUNTER BENEDICT SHEPARD, and KIM THAYIL, et al., Plaintiffs, vs. KENNETH O. EIKENBERRY, in his Official capacity as Attorney General for the State of Washington, Defendants.	No. 92-2-14258-9 ORDER DENYING PLAINTIFFS' PETITION FOR AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO 42 U.S.C. § 1988

Plaintiffs' Petition for Award of Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 1988 came for hearing on January 22, 1993, before the Honorable Mary W. Brucker of the Superior Court of King County. The Court had considered Plaintiffs' Petition and Defendants' Responses to

Plaintiffs' Petition, as well as Plaintiffs' Reply on their Petition for Award of Attorneys' Fees and Costs.

Based upon its careful consideration of the record and documents submitted, the Court finds and concludes as follows:

1.) On June 23, 1992, the Plaintiffs filed a Complaint for Declaratory Judgment and Injunctive Relief based upon RCW 7.24.

2.) On November 20, 1992, this Court held that "the erotic music statute," RCW 9.68.050 et seq., was unconstitutional and ordered that the Defendants be permanently enjoined from enforcing the erotic music statute as to sound recordings.

3.) This Court made no finding that the Defendants' [sic] were liable pursuant to 42 U.S.C. § 1983.

4.) Because the Plaintiffs' claim is a declaratory judgment action pursuant to RCW 7.24, and not a civil rights complaint pursuant to 42 U.S.C. § 1983, the Plaintiffs are not entitled to attorneys fees pursuant to 42 U.S.C. § 1988.

NOW THEREFORE, it is hereby

ORDERED that the Plaintiffs' Petition for Award of Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 1988 in this matter be and the same is hereby denied.

DATED this 11th day of February, 1993.

\s\ Mary W. Brucker
MARY W. BRUCKER
King County Superior Court
Judge

Submitted by:

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Attorney General

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\s\ Kathleen D. Mix
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\s\ Kathleen D. Mix for
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[WASHINGTON RULES OF APPELLATE PROCEDURE]

RULE 12.4 MOTION FOR RECONSIDERATION OF DECISION TERMINATING REVIEW

(a) Generally. A party may file a motion for reconsideration only of (1) a decision terminating review which is not a ruling of the appellate court commissioner or clerk, or (2) a decision by the judges granting or denying a personal restraint petition on the merits. The motion should be in the form and be served and filed as provided in rules 17.3(a), 17.4(a) and (g), and 18.5, except as otherwise provided in this rule.

(b) Time. The party must file the motion for reconsideration within 20 days after the decision the party wants reconsidered is filed in the appellate court.

(c) Content. The motion should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised.

(d) Answer and Reply. A party should not file an answer to a motion for reconsideration or a reply to an answer unless requested by the appellate court.

(e) Length-One Copy. The motion, answer, or reply should not exceed 25 pages in length if double spaced or 20 pages if one and one-half spaced unless additional length is authorized under rule 18.8. Only one legible copy should be filed.

(f) No Oral Argument. A motion for reconsideration will be decided without oral argument.

(g) Grant of Motion. If a motion for reconsideration is granted, the appellate court may (1) modify the decision without new argument, (2) call for new argument, or (3) take such other action as may be appropriate.

(h) Only One Motion Permitted. Only one motion for reconsideration may be filed, even if the appellate court modifies its decision or changes the language in the opinion rendered by the court.

[Amended effective July 2, 1976; September 1, 1983; September 1, 1990.]

(2)

Supreme Court, U.S.
FILED
SEP 21 1994
OFFICE OF THE CLERK

No. 94-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUNDGARDEN, et al.

Petitioners,

vs.

KENNETH O. EIKENBERRY, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, MOTION PICTURE ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., PUBLISHERS MARKETING ASSOCIATION, AND VIDEO SOFTWARE DEALERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT

The American Booksellers Foundation For Free Expression, Council For Periodical Distributors Associations, Freedom To Read Foundation, International Periodical Distributors Association, Motion Picture Association of America, National Association of Recording Merchandisers, Periodical and Book Association of America, Inc., Publishers Marketing Association, and Video Software Dealers of America submit this joint brief urging grant of the petition for certiorari and reversal of that part of the decision below appealed from by petitioners. This brief is submitted upon the written consents of counsel to both petitioners and respondents, which are submitted herewith.

THE AMICI

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 330 independent local wholesale distributors who distribute over 90% of all magazines in every state of the United States, as well as comic books, paperback books and newspapers.

The Freedom To Read Foundation ("FTR") is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to

include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The International Periodical Distributors Association ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Motion Picture Association of America is a not-for-profit corporation founded in 1922 for the purpose of promoting the interest of the motion picture industry in the United States and helping the industry maintain high standards and public goodwill.

The National Association of Recording Merchandisers is an international trade association whose more than 1,000 members represent recorded entertainment retailing, wholesaling, distributing and manufacturing.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

The Publishers Marketing Association ("PMA") is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Video Software Dealers Association is a trade association representing the interests of video retailers, distributors and suppliers. It represents more than 4,000 member-companies, including the home video divisions of the major film studios and major video chains such as Blockbuster as well as thousands of independent retailers throughout the United States.

INTEREST OF THE AMICI

Amici's members publish, produce, distribute and sell books, magazines, videos, sound recordings, and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. Because *amici's* members include publishers, distributors and booksellers who create, distribute and sell popular and potentially provocative literary, scientific and scholarly books, periodicals and recordings, they are from time to time faced with criminal statutes and ordinances that they believe violate their First Amendment rights. *Amici's* members are law-abiding citizens and do not desire to violate valid constitutional laws. In the face of passage of a law believed to be unconstitutional, under the decision of the Washington Supreme Court members of *amici* are faced with an unworkable dilemma. On the one hand, they could self-censor material they believe to be unconstitutional, interrupt their business operations and restrict distribution of material to which the public is constitutionally entitled. On the other hand, they could affirmatively seek arrest, with the related community opprobrium, in order to challenge what they believe to be unconstitutional statutes. They should not be forced to this unenviable choice.

Thus, in the past *amici* or their members have brought numerous actions in both federal and state courts prior to enforcement against them or others under 42 U.S.C. § 1983 to assert such unconstitutionality of newly passed invalid laws.

See, e.g., Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *Hudnut v. American Booksellers Ass'n*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); *Village Books v. Bellingham*, No. C88-1470D, U.S. Dist. Ct., W.D. Wash. (Feb. 9, 1989); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n*, 582 S.W.2d 738 (Tenn. 1979).

Under the decision below, relief under § 1983 is no longer available in the Washington state courts on the facts of this case. Therefore, even when the unconstitutionality of the legislation is successfully demonstrated, as in this case, plaintiffs cannot recover their legal fees under § 1988.

SUMMARY OF ARGUMENT

The Supreme Court of Washington, exercising jurisdiction under state law, correctly ruled that the challenged statute violated the First Amendment to the U.S. Constitution. The Washington court incorrectly held, however, that it could not grant similar relief under federal law (42 U.S.C. § 1983), and therefore denied successful plaintiffs attorneys' fees under 42 U.S.C. § 1988. Prior to that decision, no court, either state or federal, had held that there is no cause of action under § 1983 to enforce First Amendment rights when the challenge is brought prior to active enforcement of the statute by state officials, even though plaintiffs justifiably fear enforcement. Therefore, the decision below is in direct conflict with the decisions of this Court. *E.g., Virginia v. American Booksellers Ass'n, supra.*

To the contrary, the unconstitutional statute, and plaintiffs' justifiable fear of its enforcement, casts a chilling effect on plaintiffs' legitimate constitutionally protected activities entitling them to immediate pre-enforcement relief. This Court, as well as lower courts and state supreme courts, have consistently held that where "plaintiffs have . . . an actual and well-founded fear that the law will be enforced against them" and the danger of an unconstitutional statute restricting speech is, "in large measure, one of self-censorship," there is "a harm that can be realized even without an actual prosecution." *Virginia v. American Booksellers Ass'n*, 484 U.S. at 393.

The decision below, by finding no § 1983 violation and denying these successful First Amendment plaintiffs the federal recovery of court awarded attorneys' fees to which they would otherwise be entitled, deprives plaintiffs of an important aspect of this federally-granted relief. Further, the public policy as expressed in §§ 1983 and 1988 demonstrates the importance of awarding recovery of attorneys' fees to persons bringing successful, pre-enforcement constitutional challenges, particularly in the First Amendment area. The alternative would be to require legitimate publishers, booksellers and distributors of constitutionally protected materials to seek arrest and criminal prosecution in order to challenge an unconstitutional statute. The law does not exact this intolerable burden and risk on businesspersons for asserting First Amendment rights. Nor is imposing this burden an efficient or reasonable use of the criminal justice system.

The problem has become particularly acute in recent years when legislators, faced with political and social pressures, pass statutes which they know are likely to be held unconstitutional, intentionally leaving it to the courts to make politically sensitive decisions. Particularly in light of such

political gamesmanship, the cost of striking down unconstitutional laws should not be imposed upon legitimate businesspersons.

ARGUMENT

I. THE RULING OF THE WASHINGTON SUPREME COURT THAT A PRE-ENFORCEMENT CHALLENGE TO AN UNCONSTITUTIONAL STATUTE CANNOT BE BROUGHT UNDER 42 U.S.C. § 1983 HAS NO SUPPORT IN THE CASES

Section 1983 of Title 42 of the United States Code grants redress to every person who under color of law is deprived of any rights, privileges or immunities secured by the Constitution and laws of the United States. The text of § 1983 nowhere requires that a plaintiff suffer an arrest before bringing a claim. This Court has consistently held that the existence of an unconstitutional state law, violative of the First Amendment, creates a cause of action under § 1983 in favor of persons who have a reasonable fear of the unconstitutional statute being enforced against them. Indeed, Justice Brennan emphatically rejected any arrest requirement in *Virginia v. American Booksellers*, a pre-enforcement action brought by some of the *amici* under 42 U.S.C. § 1983:

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

484 U.S. at 393. *Cf. Garland Indep. Sch. Dist. v. Texas State Teachers Ass'n*, 479 U.S. 801 (1986) (summarily affirming a Fifth Circuit decision that granted relief under § 1983 despite a lack of enforcement).

Similarly, in *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), plaintiffs, including some of the *amici*, brought a pre-enforcement action to declare an Indianapolis ordinance unconstitutional under the First Amendment. There, as here, plaintiffs feared that the legislation would infringe upon their First Amendment rights. While in the present case there was "unchallenged" testimony of actual self-censorship by plaintiffs (A-18), in *Hudnut* a preliminary injunction was granted almost immediately, precluding the necessity for self-censorship. Nevertheless, a declaration of unconstitutionality was entered by the U.S. District Court under § 1983, affirmed by the Court of Appeals and this Court. *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). Legal fees were awarded to plaintiffs under 42 U.S.C. § 1988. *American Booksellers Ass'n v. Hudnut*, 650 F. Supp. 324 (S.D. Ind. 1986).

The Supreme Court of Washington cites no decision of this Court in support of its remarkable conclusion that a statute must actually have been enforced before plaintiffs who reasonably fear enforcement may challenge its constitutionality under 42 U.S.C. § 1983. There is none. Nor are there lower federal court decisions supporting this view. The only authorities cited by the Washington Supreme Court are five state court decisions (A-35, fn. 76). One of the cases, *Collier v. Tacoma*, 121 Wash. 2d 737, 854 P.2d 1046 (1993), has no bearing on the issue here because it involved a *post*-enforcement challenge to the constitutionality of an ordinance. Two others, *Jacobsen v. Seattle*, 98 Wash. 2d 668, 658 P.2d 653 (1983) and *Duranceau v.*

Tacoma, 37 Wash. App. 846, 684 P.2d 1311 (1984), also shed no light on this case. They involve constitutional challenges after state action occurred, absent any statutory challenge. The last two cases, *Rains v. State*, 100 Wash. 2d 660, 674 P.2d 165 (1983) (collateral estoppel) and *Ryder v. Port of Seattle*, 50 Wash. App. 144, 748 P.2d 243 (1987) (exhaustion of remedies) denied liability for reasons not relevant here, and therefore the courts never reached the issue of attorneys' fees.

None of these cases presented the opportunity to discuss, much less determine, whether a pre-enforcement action entitled the plaintiff to relief under § 1983 and attorneys' fees under § 1988. The fact that all of the successful, prior Washington cases involved enforcement does not mean that a cause of action fails to accrue under § 1983 absent enforcement, any more than, had the plaintiffs in those cases all been residents of Seattle, a cause of action would fail to accrue under § 1983 for residents of Spokane.

The ruling of the Washington Supreme Court as to the applicability of 42 U.S.C. to pre-enforcement suits is simply in error. A plaintiff need not seek arrest and bear the publicity of being branded an accused criminal to be relieved from the burdens of an unconstitutional statute. As this Court has stated in a comparable situation:

> the hapless plaintiff [need not be placed] between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

Steffel v. Thompson, 415 U.S. 452, 462 (1974) (citation omitted).

II. THE DECISION BELOW CONTRAVENES THE PURPOSE OF THE FEDERAL STATUTORY SCHEME GRANTING ATTORNEYS' FEES TO PERSONS BRINGING SUCCESSFUL PRE-ENFORCEMENT CONSTITUTIONAL CHALLENGES

It is expensive to litigate constitutional issues, and constitutionally-suspect legislation is not generally directed against the rich and powerful. Consequently, 42 U.S.C. § 1983 awards the cost of litigation, including attorneys' fees, to those plaintiffs who successfully mount challenges to unconstitutional litigation. As this Court stated earlier this year:

> Oftentimes, in the civil rights context, impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees.

Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1028 (1994). This Court consistently has recognized the importance of protecting against the "chilling effect" on First Amendment rights of the mere threat of enforcement, resulting in self-censorship. *Virginia v. American Booksellers Ass'n*, 484 U.S. at 392. Persons such as *amici* are vital to the maintenance of First Amendment freedom through the enforcement of civil rights laws:

> [C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. In many cases

> arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

The availability of §§ 1983 and 1988 is particularly important given the readiness of many law-makers, when subject to political and social pressure, to pass constitutionally-suspect legislation with the view - "let the courts find it unconstitutional.[1]" It is therefore important that §§ 1983 and 1988 be available for pre-enforcement challenges of unconstitutional legislation by plaintiffs having "an actual and well-founded fear" of enforcement.

Finally, it is not an efficient use of the criminal justice system to require solicited arrests to commence a constitutional challenge.

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[1] For example, Beulah Coughenour, a leading proponent on the Indianapolis City-County Council which promulgated the ordinance found unconstitutional in *American Booksellers Ass'n v. Hudnut, supra*, stated during hearings on the bill that the legislators were "not here to decide constitutionality" and that the City-County Council should "give a chance for the proposed legislation," whatever its deficiencies, to "have its day in Court." Hearing, Indianapolis City-County Council, Admin. Comm. (Apr. 16, 1984). *Amici* have heard similar statements regularly from legislators.

CONCLUSION

For the reasons set forth above, we respectfully urge that a writ of certiorari should issue to review and reverse the decision of the Supreme Court of the State of Washington as to attorneys' fees.

September 21, 1994

Respectfully submitted,

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No. 94-326

Supreme Court, U.S.
FILED
NOV 14 1994
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

SOUNDGARDEN, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF THE STATE OF WASHINGTON, et al.

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

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RESPONDENTS' BRIEF IN OPPOSITION

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November 1994

19 pp

QUESTION PRESENTED

Whether a state officer acting in his or her official capacity, who has never threatened or sought to enforce a state statute, is liable for attorneys' fees pursuant to 42 U.S.C. § 1988 when the plaintiff brings an action against the state and the officer challenging the constitutionality of that statute pursuant to a state declaratory judgment act and 42 U.S.C. § 1983 and the plaintiff obtains declaratory and injunctive relief against both the state and the officer pursuant to the state declaratory judgment act but not § 1983.

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No. 94-326

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

SOUNDGARDEN, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF THE STATE OF WASHINGTON, et al.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents the state of Washington and the Attorney General of Washington respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Washington Supreme Court's opinion in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The action below was resolved pursuant to the Washington Uniform Declaratory Judgment Act, not 42 U.S.C. § 1983.

Petitioners are not entitled to attorneys' fees under 42 U.S.C. § 1988 because this action was resolved under the Washington Uniform Declaratory Judgment Act, Wash. Rev. Code § 7.24.010 *et seq.*, not 42 U.S.C. § 1983. The action was filed against the state of Washington, the Washington Attorney

General[1] and the King County Prosecuting Attorney,[2] both in their official capacity. Pet. C-3; C-18, ¶ 6. With regard to jurisdiction, the complaint alleged: "This court has jurisdiction over this declaratory judgment action pursuant to RCW 9.42.010, *as a claim against the state of Washington*, and pursuant to the Uniform Declaratory Judgment Act, RCW 7.42.010, *et seq.*" Pet. C-4, ¶ 3 (emphasis added).

The first jurisdictional statute cited by petitioners, Wash. Rev. Code § 4.92.010, provides in part that: "Any person or corporation *having any claim against the state of Washington shall have right of action against the state in the superior court.*" (Emphasis added.) App. 2a. Wash. Rev. Code § 7.24.010 states:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

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[1] When this action was filed, the Washington Attorney General was Kenneth O. Eikenberry. Mr. Eikenberry's successor in office is Attorney General Christine O. Gregoire.

[2] Petitioners also named the Snohomish County Prosecuting Attorney as a defendant, but he was dismissed from the case on jurisdictional grounds and is not a party to this proceeding.

Although petitioners' third claim for relief alleged a violation of 42 U.S.C. § 1983 and sought attorneys' fees pursuant to 42 U.S.C. § 1988 (Pet. C-24), the case was not decided on that basis.

This is established by the procedure in the case. First, petitioners brought this action against the state of Washington. It is well established that the state is not a "person" within the meaning of 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Thus, while it is perfectly proper to bring an action against the state pursuant to Wash. Rev. Codes §§ 4.92.010 and 7.24.010, the action cannot be maintained under § 1983.[3]

It is true that the petitioners also named the Attorney General and King County Prosecuting Attorney in their official capacity. However, relief against the state, itself, was central to the petitioners' case. The trial court declared the state's child obscenity law unconstitutional and enjoined the "state of Washington, its officers, agents, servants, employees, and attorney" from enforcing the statute. Pet. D-11, ¶ 4.

The order also enjoined the Attorney General and King County Prosecutor from enforcing the law. However, an

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[3] Washington has not waived its sovereign immunity to § 1983 actions brought in state court. *Rains v. State*, 100 Wn.2d 660, 667-68, 674 P.2d 165 (1983); *Hontz v. State*, 105 Wn.2d 302, 309-10, 714 P.2d 1176 (1986).

injunction against these two officials, alone, would not give the petitioners the relief throughout the state. The injunction against the Attorney General was essentially useless since the Washington Attorney General does not enforce criminal law. (*See infra* pp. 5-6). The injunction against the King County Prosecuting Attorney would only be applicable in that county.

When the petitioners sought attorneys' fees, the trial court correctly concluded that they had essentially abandoned their claim under 42 U.S.C. § 1983 in favor of a declaratory judgment action against the state of Washington and other defendants. According to the trial court:

> Because the Plaintiffs' claim is a declaratory judgment action pursuant to RCW 7.24, and not a civil rights complaint pursuant to 42 U.S.C. § 1983, the Plaintiffs are not entitled to attorneys' fees pursuant to 42 U.S.C. § 1988.

Pet. E-2, ¶ 4. This conclusion is consistent with the order granting the injunction (which was drafted by petitioners) which refers to the action as one for declaratory judgment. ("THIS MATTER came for hearing on October 29, 1992, before the Honorable Mary W. Brucker of the Superior Court of King County on *Plaintiffs' Complaint for a declaratory judgment that* . . . ." Pet. D-1.)

Petitioners argue that the trial court's reasoning runs afoul of the rule that when a claim upon which a plaintiff actually prevails is accompanied by a substantial though

undecided § 1983 claim arising from the same nucleus of facts, a fee award is appropriate. Pet. 20 n.10. This is not the situation presented in this case. Petitioners essentially abandoned their § 1983 claim in favor of a declaratory judgment action against the state of Washington, the Attorney General and the King County Prosecuting Attorney.

2. Petitioners did not establish a violation of 42 U.S.C. § 1983.

Even if petitioners did not abandon their § 1983 claim, the Washington Supreme Court ruled that the petitioners failed to establish a claim under § 1983 because "§ 1983 requires infringement of a person's civil rights before a cause of action accrues. It is undisputed that in this case neither [the Attorney General] nor [the King County Prosecuting Attorney], individually or in their official capacity, has prosecuted or attempted to prosecute anyone under the 'Erotic Music Statute'[.]" *Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 766, 871 P.2d 1050 (1994); Pet. A-35.[4]

The Washington Supreme Court's conclusion is correct. There is absolutely no evidence in the record that the Attorney General or the King County Prosecutor ever threatened or sought to enforce the child obscenity laws. In the case of the Attorney

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[4] This failure of proof is consistent with the trial court's conclusion that petitioners essentially abandoned their § 1983 claim.

General this is because the Attorney General does not have general criminal jurisdiction. Under the Washington Constitution: "The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." Wash. Const. art. III, § 21. The statutes permit the Attorney General to prosecute a criminal case only upon request of the Governor or a prosecuting attorney. Wash. Rev. Code §§ 43.10.090, 43.10.232. App. 1a.

Under Washington law the general authority to prosecute crimes is granted to the county prosecuting attorney. Wash. Rev. Code § 36.27.020(4). The Attorney General is limited to consulting on such cases (unless requested to prosecute). *State ex rel. Hamilton v. Superior Court*, 3 Wash. 2d 633, 101 P.2d 588 (1940); *State ex rel. Attorney General v. Seattle Gas Co.*, 28 Wash. 488, 68 P. 946 (1902).

At trial petitioners made no attempt to establish that either the Attorney General or the King County Prosecuting Attorney had threatened or sought to enforce the child obscenity statutes.[5] 42 U.S.C. § 1983 provides in part that:

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[5] Indeed, the King County Prosecuting Attorney took no active role in this case and did not appeal the trial court's decision. Before the supreme court, the King County Prosecuting Attorney was merely an interested party. 123 Wash. 2d at 753, n.1. Pet. A-4 n.1.

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

There are two elements necessary to establish a violation of § 1983:

> First, the plaintiff must prove that the *defendant has deprived him* of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the *defendant deprived him* of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."

Adickes v. Kress & Co., 398 U.S. 144, 151 (1970). *See also Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

The first element requires that the defendant do something, that is, deprive the plaintiff of a right secured by the Constitution. In this case neither the Attorney General nor the King County Prosecuting Attorney threatened or took any other action to deprive petitioners of any right.

The requirement that a plaintiff prove that the defendant took some action to deprive the plaintiff of his or her rights is consistent with the legal basis for § 1983 jurisdiction. A § 1983 action for damages will not lie against a state or a state officer, acting in his or her official capacity, in federal court or in state court, if the state has not waived its sovereign immunity. *Will*

v. Michigan Dep't of State Police, 491 U.S. at 71; *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

There is an exception to this rule. A state officer may be sued, in his or her official capacity, for injunctive relief under § 1983 "because official-capacity actions for prospective relief are not treated as actions against the State. See Ex parte Young, 209 U.S. 123 (1908)." *Kentucky v. Graham*, 473 U.S. at 167, n.14. The reason for this different rule is set out in *Ex Parte Young* as follows:

> *If the act which the state attorney general seeks to enforce* be a violation of the Federal Constitution, the officer, in proceeding under such enactment, *comes into conflict with the* superior authority of that *Constitution*, and *he is* in that case *stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.* The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. 123, 159-60 (1908) (emphasis added).

Thus, the basis for § 1983 jurisdiction is that the state officer is acting in an unconstitutional manner. If the officer does not act (or threaten to act) in an unconstitutional manner there is no basis for stripping away the state's cloak of immunity.

3. The decision below does not conflict with the decisions of this Court.

Petitioners assert that the decision below conflicts with *Texas State Teachers' Ass'n v. Garland Indep. Sch. Dist.*, 489

U.S. 782 (1989). Pet. 9-11. This is incorrect because in *Garland* this Court believed that the unconstitutional regulation was likely to be enforced. This Court said:

> [The Court of Appeals] found that the prohibition of teacher speech promoting union activity during school hours was unconstitutional. *It also found that there was a distinct possibility that the school district would discipline teachers who engaged in any discussion of employee organizations during the schoolday*, and that such a policy had a chilling effect on teachers' First Amendment rights.

489 U.S. 786 (citation omitted) (emphasis added). Of course, in this case there was no such finding by either the Washington Supreme Court or the trial court. Indeed, the Washington Supreme Court reached the opposite conclusion.

The amici curiae assert that pre-enforcement actions are necessary to avoid placing a person in the position of risking a criminal sanction to test the applicability of the law. Am. Br. 8. This argument misses the point. A plaintiff who is not subject to the deprivation of his or her rights under § 1983 may still bring a declaratory judgment action to determine his or her rights under the law. However, standing to bring a declaratory judgment action does not automatically translate into a violation of § 1983.

4. This case presents a unique situation that is not ripe for a decision by this Court.

The Washington Supreme Court concluded that there was no liability under § 1983 because the petitioners did not establish

that either the Attorney General or the King County Prosecuting Attorney threatened or sought to enforce the child obscenity statutes. At this point, it is hard to predict the impact of the Washington Supreme Court's analysis. It may be that future plaintiffs will have little difficulty establishing that a state officer, acting in his or her official capacity, has threatened or sought to enforce an unconstitutional law.

For example, in several cases cited by petitioner, the courts found action on the part of the defendants that would give rise to § 1983 liability. *See Garland*, 489 U.S. at 786 ("[the court of appeals] also found that there was a distinct possibility that the school district would discipline teachers who engaged in any discussions of employee organizations during the school-day[.]"); *Fernandes v. Limmer*, 663 F.2d 619, 624 (5th Cir. 1981) ("[t]his controversy first erupted in late 1974 when . . . members were arrested by . . . police for soliciting funds, selling merchandise, and distributing literature in the terminal buildings without a permit in violation of airport regulations."); *Sable Communications of California v. Pacific Tel. & Tel.*, 890 F.2d 184, 186 (9th Cir. 1989) ("Shortly after initiating its sexually explicit message service, Sable received a letter from Pacific Bell threatening to disconnect the service under Tariff 173-T.")

In each of these cases there was a factual finding that would give rise to a conclusion that the defendant had threatened

or was likely to enforce the unconstitutional law which would violate § 1983. The result in these decisions is consistent with the ruling of the Washington Supreme Court.

Here, petitioners' failure to prove a violation of § 1983 may make this case unique. And this failure may be due to the fact that petitioners were concentrating their efforts on their declaratory judgment action against the state, as opposed to a § 1983 action against state officials. Thus, petitioners' dire predictions regarding the impact of this case are premature.

The premature nature of the question presented is also illustrated by lower court decisions cited by petitioners. Petitioners assert that the decision below conflicts with lower court decisions. Pet. 12-16. In fact, these cases illustrate that most courts have simply not considered whether § 1983 liability requires some action on the part of a state official to deprive the plaintiff of his or her rights. For example, in *Aware Women Clinic, Inc. v. City of Coco Beach Florida*, 629 F.2d 1146 (5th Cir. 1980), *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), and *BSA, Inc. v. King Cy.*, 804 F.2d 1104 (9th Cir. 1986), the court found a violation of § 1983 and authorized attorney fees. However, there is no discussion in these cases of whether the officials involved threatened or sought to enforce the statutes in question or whether this was a necessary requirement to establish § 1983 liability. The issue was simply not considered.

In this respect, the question presented by petitioners is not ripe for review. Other courts have not analyzed the issue and this Court does not have the benefit of analysis agreeing or disagreeing with the Washington Supreme Court. The Court would be better served by allowing this issue to percolate in the lower courts long enough to define the problem and air competing views.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 1994

APPENDIX

Wash. Rev. Code § 43.10.090 Criminal investigations–Supervision. Upon the written request of the governor the attorney general shall investigate violations of the criminal laws within this state.

If, after such investigation, the attorney general believes that the criminal laws are improperly enforced in any county, and that the prosecuting attorney of the county has failed or neglected to institute and prosecute violations of such criminal laws, either generally or with regard to a specific offense or class of offenses, the attorney general shall direct the prosecuting attorney to take such action in connection with any prosecution as the attorney general determines to be necessary and proper.

If any prosecuting attorney, after the receipt of such instructions from the attorney general, fails or neglects to comply therewith within a reasonable time, the attorney general may initiate and prosecute such criminal actions as he shall determine. In connection therewith, the attorney general shall have the same powers as would otherwise be vested in the prosecuting attorney.

From the time the attorney general has initiated or taken over a criminal prosecution, the prosecuting attorney shall not have power or authority to take any legal steps relating to such prosecution, except as authorized or directed by the attorney general.

Wash. Rev. Code § 43.10.232 Concurrent authority to investigate crimes and initiate and conduct prosecutions–Payment of costs. (1) The attorney general shall have concurrent authority and power with the prosecuting attorneys to investigate crimes and initiate and conduct prosecutions upon the request of or with the concurrence of any of the following:

(a) The county prosecuting attorney of the jurisdiction in which the offense has occurred;

(b) The governor of the state of Washington; or

(c) A majority of the committee charged with the overright of the organized crime intelligence unit.

(2) Such request or concurrence shall be communicated in writing to the attorney general.

(3) Prior to any prosecution by the attorney general under this section, the attorney general and the county in which the offense occurred shall reach an agreement regarding the payment of all costs, including expert witness fees, and defense attorneys' fees associated with any such prosecution.

Wash. Rev. Code § 7.24.010 Authority of courts to render. Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Wash. Rev. Code § 7.24.100 Costs. In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just.

Wash. Rev. Code § 4.92.010 Where brought—Change of venue. Any person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court.

The venue for such actions shall be as follows:

(1) The county of the residence or principal place of business of one or more of the plaintiffs;

(2) The county where the cause of action arose;

(3) The county in which the real property that is the subject of the action is situated;

(4) The county where the action may be properly commenced by reason of the joinder of an additional defendant; or

(5) Thurston county.

Actions shall be subject to change of venue in accordance with statute, rules of court, and the common law as the same now exist or may hereafter be amended, adopted, or altered.

Actions shall be tried in the county in which they have been commenced in the absence of a seasonable motion by or in behalf of the state to change the venue of the action.